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Immigration Enforcement Preemption

PRATHEEPAN GULASEKARAM*

The Supreme Court's 2012 decision, Arizona v. United States, turned back the most robust and brazen state regulation of immigration in recent memory, striking down several provisions of Arizona's omnibus enforcement law. Notably, the Court did not limit preemption inquiries to conflicts between the state law and congressional statutes. The Court also based its decision on the tension between the state law and Executive Branch enforcement policies. The landmark decision seemed to have settled the Court's approach to immigration enforcement federalism. Yet, a scant eight years after Arizona, in Kansas v. Garcia, the Court upheld Kansas's prosecutions of noncitizens who used stolen identities to procure employment in violation of federal immigration law. In so doing, the majority opinion took aim at Arizona's central premise, rejecting the relevance of presidential enforcement in immigration preemption.

This Article provides an urgently needed reappraisal of immigration preemption in the wake of Kansas. My primary claim is that immigration preemption requires a framework that accounts for the diminishing relevance of formal law, the discretionary enforcement options available to federal authorities, and the inherent liabilities associated with unauthorized status. I argue that presidential enforcement practices—as a distillation of competing statutory values, congressional appropriations, executive policy preferences, and allocation of agency resources—limn federal policy for immigration preemption purposes. In defending this claim, this Article recasts immigration preemption decisions from the past fifty years, revealing a long-standing judicial concern for federal enforcement practices. Second, this Article critiques Kansas for discounting federal enforcement practices, and defends a return to Arizona-like jurisprudence. Finally, it argues that this approach will not unduly aggrandize judicial or executive power, or imbalance federal-state authority over criminal enforcement.

* Professor of Law, Santa Clara University School of Law. This Article has benefited from the comments and questions of Professors Hiroshi Motomura, Rick Su, David S. Rubenstein, Rose C. Villazor, Stephen Lee, Catherine Kim, David Sloss, Bradley Joondeph, Colleen Chien, David Yosifon, W. David Ball, and the participants in the Faculty Workshop Series at Santa Clara University. It builds upon ideas that were first published in posts for SCOTUSblog re: *Kansas v. Garcia*, and the Balkinization blog as part of a series responding to ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020).

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I. INTRODUCTION

In the late 2000s, Arizona became the epicenter of state-level immigration restrictionism, culminating in enactment of the state's notorious enforcement scheme, Senate Bill (SB) 1070.¹ In devising that statute, state lawmakers drew lessons from earlier attempts in places like California and Texas that were struck down by federal courts or expressly preempted by federal law.² Despite

¹ See Support Our Law Enforcement and Safe Neighborhoods Act, Senate Bill 1070, ch. 113, 2010 Ariz. Sess. Laws 2d Reg. Sess. 450 (codified in scattered sections of ARIZ. REV. STAT. ANN.) (preempted in part by *Arizona v. United States*, 567 U.S. 387 (2012)).

² *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995) (preliminarily enjoining California Proposition 187); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1245, 1261 (C.D. Cal. 1997) (holding California Proposition 187 was preempted by federal law); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down Texas law denying free public primary education to unauthorized noncitizens); *De Canas v. Bica*, 424 U.S. 351, 353, 364–65 (1976) (upholding California's employer sanctions law for hiring unauthorized noncitizens, later preempted by Immigration

attempting to avoid the pitfalls of those prior state efforts, Arizona lost. In *Arizona v. United States* (2012), the Supreme Court invalidated three of the law's four contested provisions on preemption grounds.³

Though it ultimately failed, the rise and fall of SB 1070 remains critical to understanding immigration federalism and the viability of state-level enforcement measures.⁴ The *Arizona* majority employed an ostensibly novel methodology to invalidate the state's attempt to regulate noncitizens. Specifically, the opinion included the federal Executive Branch's enforcement prerogatives in its calculus, leading the majority to conclude that the state law created obstacles to the president's ability to effectuate those priorities.⁵ In other words, the majority enjoined parts of SB 1070 because the law undermined federal immigration enforcement by the President and not necessarily because of any specific conflict with the text of federal statutes or regulations.

Writing in the wake of *Arizona*, scholars like Lucas Guttentag described the opinion as the "most consequential immigration preemption decision in decades."⁶ Professors Adam Cox and Cristina Rodríguez in their in-depth treatment of the president's role in immigration policy, focused extensively on *Arizona*, noting how the case reified executive primacy in immigration law,

Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in various sections of Title 8 of the U.S. Code)).

³ *Arizona v. United States*, 567 U.S. 387, 416 (2012). The fourth provision was not preempted and was allowed to go into effect. *Id.* After subsequent litigation and a settlement agreement, however, the state eventually abandoned enforcement of that final provision. Nigel Duara, *Arizona's Once-Fearful Immigration Law, SB 1070, Loses Most of Its Power in Settlement*, L.A. TIMES (Sept. 15, 2016), <https://www.latimes.com/nation/la-na-arizona-law-20160915-snap-story.html> [<https://perma.cc/P96Y-JJQK>].

⁴ By "immigration federalism" I refer to state and local immigration laws and judicial analysis of the same. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 4–6 (2015); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013). More specifically, by "enforcement federalism" I am referring to subfederal attempts at enforcing federal immigration law or creating or using state-level crimes to prosecute noncitizens in ways that potentially implicate immigration concerns.

⁵ Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 51–52 (noting that overlapping and redundant enforcement between federal and state authorities is common in many regulatory areas); *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020) ("The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption.").

⁶ Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 1 (2013); see also Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 694 (2014) (describing the decision's enabling of presidential power as "unprecedented").

even if it was formally a federalism opinion.⁷ Other academic commentary that followed *Arizona*, whether supportive or critical of the court's methodology, appeared to rest on the assumption that the case would remain the governing approach to preemption of state-level immigration enforcement policies.⁸

In the immediate aftermath of *Arizona*, it would have been hard to predict the drastic changes to immigration enforcement and state involvement that would unfold over the following decade. First, Donald Trump assumed the presidency, kickstarting his campaign with a virulently anti-immigrant, hyper-enforcement agenda.⁹ His presidency was marked by repeated attempts—some successful—to push constitutional boundaries on the exclusion of immigrants, federal enforcement tactics, and the conscription of states and localities into immigration enforcement.¹⁰ Second, Justice Anthony Kennedy, author of the five justice majority in *Arizona*, retired from the Court.¹¹ His retirement would allow Justice Samuel Alito—a dissenter in *Arizona*—to command a majority of the Court in critical immigration cases.¹²

These personnel changes in the Executive and Judicial Branches laid the groundwork for repudiating the central tenets of *Arizona*, just a scant eight years after it was decided. In *Kansas v. Garcia* (2020), the Court permitted Kansas to use its identity theft and fraud laws to punish unauthorized noncitizens seeking to procure employment.¹³ It was a dramatic turn, given that *Arizona* appeared to have settled that the federal government maintained exclusive control over

⁷ ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 151–52 (2020).

⁸ See, e.g., KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R42719, *ARIZONA V. UNITED STATES: A LIMITED ROLE FOR STATES IN IMMIGRATION ENFORCEMENT*, 3–4, 11 (2012); Marc L. Miller & Gabriel J. Chin, *S.B. 1070 Rides Off into the Sunset*, SCOTUSBLOG (June 25, 2012), <https://www.scotusblog.com/2012/06/online-symposium-s-b-1070-rides-off-into-the-sunset/> [<https://perma.cc/4AT8-DXMZ>].

⁹ Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200–03 (2019) (cataloguing Trump's anti-immigrant policies).

¹⁰ See, e.g., Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799–800 (Jan. 25, 2017); Proclamation 9822, 83 Fed. Reg. 57661 (Nov. 9, 2018); Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); Proclamation 9945, 84 Fed. Reg. 53991 (Oct. 4, 2019).

¹¹ Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018), <https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/> [<https://perma.cc/67WS-EWAX>].

¹² See, e.g., *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2021) (Alito, J. writing for the majority); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1962 (2020) (Alito, J. majority opinion); *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020) (Alito, J. majority opinion); see also *Jennings v. Rodriguez*, 138 S. Ct. 830, 835 (2018) (Alito, J., majority opinion joined by Kennedy, J.).

¹³ *Garcia*, 140 S. Ct. at 797.

the regulation of unauthorized employment,¹⁴ a position the U.S. Department of Justice subsequently reiterated in litigation up through the Trump presidency.¹⁵ Writing for a new five justice majority, Justice Alito's opinion suggests that immigration enforcement should be treated like other regulatory areas where enforcement redundancy and overlap between federal and state authorities is common.¹⁶ More pointedly, the opinion discards the relevance of presidential enforcement priorities and practices, dismissing them as beyond the scope of preemption analysis.¹⁷

The migration from *Arizona* to *Kansas* is symbolically, practically, and theoretically important. Symbolically, it draws attention to state-level attempts at restrictionism as those efforts retreat from the coasts and border states to deep in the heartland of the nation. That shift showcases how ingrained state involvement in immigration has become in our legal landscape and highlights the extent to which migration control happens far away from the physical border. Practically, the stakes are high. Over eleven million individuals are unlawfully present in the United States and state level crimes continue to render lawfully present noncitizens subject to removal.¹⁸ As such, whether states can enforce immigration laws, create their own enforcement policies, or use existing state laws as proxies for federal enforcement, dictates the possibilities for millions of noncitizens to participate fully in the social and economic life of the nation.¹⁹ Theoretically, the migration from *Arizona* to *Kansas* resurfaces profound separation of powers and federalism debates raising difficult questions about the role of the President in defining federal policy vis-à-vis both Congress and the states.

¹⁴ *Arizona v. United States*, 567 U.S. 387, 404 (2012). (“Congress enacted IRCA as a comprehensive framework for ‘combatting the employment of illegal aliens.’” (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002))).

¹⁵ See Brief for the United States as Amicus Curiae in Support of Neither Party at 1–3, 18, *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016) (Nos. 15-15211, 15-15213, 15-15215).

¹⁶ Pratheepan Gulasekaram, *Opinion Analysis: Divided Court Permits State Identity-Theft Prosecution of Noncitizens in the Employment Process*, SCOTUSBLOG (Mar. 4, 2020), <https://www.scotusblog.com/2020/03/opinion-analysis-divided-court-permits-state-identity-theft-prosecution-of-noncitizens-in-the-employment-process/> [<https://perma.cc/K6WW-6RU2>].

¹⁷ *Id.*

¹⁸ 8 U.S.C. § 1182 (a)(2)(A)(i)(II); Nicole Ward & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Mar. 14, 2023), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [<https://perma.cc/E7QX-46VP>] (estimating about eleven million unauthorized immigrants in the United States in 2019).

¹⁹ DANYELLE SOLOMON, TOM JAWETZ & SANAM MALIK, CTR. FOR AM. PROGRESS, THE NEGATIVE CONSEQUENCES OF ENTANGLING LOCAL POLICING AND IMMIGRATION ENFORCEMENT 3 (Mar. 2017), <https://www.americanprogress.org/wp-content/uploads/sites/2/2017/03/LawEnforcementSanctuary-brief.pdf> [<https://perma.cc/PS4J-SSHP>].

In the wake of *Kansas*, a reappraisal of immigration preemption is imperative. My primary claim is that the diminished relevance of formal law in immigration, combined with the prominence of Executive Branch practices and discretionary enforcement choices, necessitate a preemption framework that is equal to the complexity and reality of federal immigration policy. Realizing that goal requires abandoning *Kansas* and returning to the basic principles embedded in immigration federalism jurisprudence from the prior several decades and given full-throated expression in *Arizona*.

Entering at the intersection of scholarly literature on preemption doctrine,²⁰ executive authority in immigration,²¹ and enforcement federalism,²² this Article makes three original contributions. First, it situates post-1965 enforcement federalism jurisprudence, examining the origins of the modern doctrine, and its eventual relocation to *Kansas*. Revisiting those foundational cases with a fresh perspective reveals a long-standing judicial concern with executive enforcement practices. Second, contextualized within that narrative, this Article shows that *Arizona*'s approach was not as novel as it may have appeared initially. Instead, it reveals *Kansas* as the doctrinal outlier because of its formalistic and exclusive focus on the text of the immigration code. Finally, leveraging recent scholarly work on the centrality of presidential power in immigration policymaking, this Article defends the inclusion of presidential enforcement practice in immigration preemption analysis. Although enforcement priorities and practices are not "law" in the formal sense, they capture and express the conflicting purposes and meanings of the immigration code, and more accurately track immigration enforcement as experienced by noncitizens and understood by the polity.

This Article proceeds in three parts. Part II provides the necessary legislative and jurisprudential background. This section first documents Arizona's efforts in the late 2000s, including its 2008 employer sanctions law (the Legal Arizona Workers Act (LAWA)), and SB 1070 which followed soon thereafter. My account recasts *Arizona* as an unsurprising doctrinal evolution from prior immigration federalism cases, including judicial approaches to

²⁰ See generally Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 [hereinafter Young, *Ordinary Diet of the Law*]; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) [hereinafter Young, *Executive Preemption*]; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007) [hereinafter Hills, *Against Preemption*].

²¹ COX & RODRÍGUEZ, *supra* note 7, at 105; HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 22 (2014).

²² Kim, *supra* note 6, at 692; MOTOMURA, *supra* note 21, at 124; David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 984–85 (2016) (reviewing MOTOMURA, *supra* note 21); Cox, *supra* note 5, at 31–32; Roderick M. Hills Jr., *Arizona v. United States: The Unitary Executive's Enforcement Discretion as a Limit on Federalism*, 2012 CATO SUP. CT. REV. 189, 189–91 [hereinafter Hills, *Arizona*].

California's employer sanctions laws and Texas's attempt to bar undocumented schoolchildren in the 1970s, to California's Proposition 187 (Prop 187) in the early 1990s. This Article argues that those cases implicitly or explicitly accounted for executive enforcement practice in determining the viability of state interventions. Part II ends by describing the *Kansas* majority's sharp about-face on enforcement federalism, arguing that the opinion might be read—and likely was intended by its author—to reject *Arizona*'s core principle, and the framework of the several cases that preceded it.

Part III then turns to a normative defense of presidential enforcement practice in immigration preemption. I argue that exclusive judicial focus on statutory or regulatory text ignores the import of executive discretion and practices in defining immigration policy and discounts the persistent legal liabilities inherent in unlawful status. The centrality of executive practice ebbs the relative importance of formal law and obviates the incoherent task of divining preemptive intent from the colossal and contradictory immigration code. This pivotal claim builds on the foundation developed by Hiroshi Motomura,²³ and most recently by Adam Cox and Cristina Rodríguez,²⁴ who document the gaping disparity between immigration law on the books and immigration law in action.

At the same time, this Part cautions against reading *Arizona* too narrowly. A meager view of presidential enforcement would permit executives to manipulate judicial outcomes in preemption cases through public pronouncements and memoranda. Rather, this Article defends the idea that enforcement patterns and practices—informed by presidential enforcement priorities, sustained agency action, competing legislative mandates, and congressional appropriations—define federal immigration policy and set its preemptive scope. This idea moves a step-beyond current Supreme Court doctrine that imbues particular and limited Executive Branch output, such as notice and comment rulemaking, with preemptive effect. Part III concludes by reevaluating *Kansas* under this framework.

Part IV acknowledges that including presidential enforcement practice in immigration preemption raises significant separation of powers and federalism objections. First and foremost is a concern with judicial manageability and aggrandizement. Second, such an approach may raise the specter of further aggrandizing executive power at the expense of Congress. Third, it upends many governing federalism theories that defend a “presumption against preemption” both to preserve state autonomy and to spur responsive national lawmaking. Fourth, such a framework may threaten asymmetry, by tending to invalidate all

²³ MOTOMURA, *supra* note 21, at 124 (“The operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions.”); *see also* Kim, *supra* note 6, at 691–92.

²⁴ COX & RODRÍGUEZ, *supra* note 7, at 153.

restrictionist state and local policies but upholding integrationist ones. Finally, a return to *Arizona* might render immigration federalism an outlier in preemption doctrine, thereby justifying bespoke approaches to other constitutional claims in ways that inure to the detriment of noncitizens.²⁵

In addressing these powerful objections, I concede the contingent nature of my argument. One day, federal law might be restructured to constrain executive authority, eliminate the persistent legal disabilities inherent to unauthorized status, and engage states more fully in core immigration decisions. A normalized immigration enforcement system may prove *Kansas* to be preferable after all. But not until then.

II. ENFORCEMENT PRACTICES IN PREEMPTION FROM CALIFORNIA TO *KANSAS*

In present day, the doctrinal boundaries for state action have taken on renewed urgency as states recently have challenged federal enforcement proposals,²⁶ instituted their own enforcement policies,²⁷ and facilitated immigrant detention.²⁸ But the modern story of state-level enforcement began five decades ago in 1971, when California enacted its employer sanctions law.²⁹ This Part tracks the evolution of preemption doctrine in immigration over the past several decades since that California law, arriving half a century later in *Kansas*.

My description emphasizes a thematic and doctrinal point: the Court's seemingly novel approach to preemption in *Arizona*—which expressly recognized the relevance of executive enforcement practices—was not so original or surprising. Instead, it was consistent with a line of modern state immigration enforcement cases dating back nearly fifty years. This framing paves the way to understanding the novelty of the Court's approach to *Kansas*'s prosecutions of noncitizens in 2020.

²⁵ As I have argued elsewhere, exceptionalism in immigration federalism arena creates systemic effects across doctrinal areas, tending to keep constitutional adjudication of immigrants' rights or separation of powers concerns outside the constitutional mainstream as well. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584–85 (2017).

²⁶ *Texas v. United States*, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021) (holding state had standing to challenge, and then enjoining, Biden Administration's proposed 100 day pause on removals).

²⁷ Tex. Exec. Order No. GA-37 (July 28, 2021) (directing state officials to stop and reroute vehicles upon a reasonable suspicion that the vehicle is carrying a migrant who should have been excluded by COVID-related CDC orders).

²⁸ John Hudak & Christine Stenglein, *How States Can Improve America's Immigration System*, BROOKINGS (Sept. 10, 2019), <https://www.brookings.edu/research/how-states-can-improve-americas-immigration-system/> [https://perma.cc/Q23T-UNR4].

²⁹ CAL. LAB. CODE § 2805 (West 1971) (repealed 1988).

To help contextualize this discussion, it is worth recalling the basics of the Court's preemption doctrine. Based in the Supremacy Clause of Article VI,³⁰ judicial analysis queries whether state or local policies must be struck down in light of the "the Constitution," or "Laws of the United States . . . made in pursuance" of the Constitution. Federal law might preempt subfederal policy either expressly or impliedly.³¹ Express preemption depends on judicial interpretation of express articulations of preemptive intent in the text of federal law or regulation, or alternatively, intent to save or preserve concurrent state lawmaking.³² Implied preemption, in comparison, turns on judicial construction of federal intent to preempt, even when not expressly articulated.³³ State law might be impliedly preempted when state policy conflicts with federal law (conflict preemption),³⁴ when it stands as an obstacle to accomplishing federal objectives (obstacle preemption),³⁵ or when it regulates in a field pervasively occupied by the federal policy (field preemption).³⁶ Within mainstream preemption analysis, "law" for purposes of the Supremacy Clause clearly encompasses Congress's statutory enactments. In some instances, however,

³⁰ U.S. CONST. art. VI, cl. 2.

³¹ *FMC Corp. v. Holliday*, 498 U.S. 52, 56–57 (1990) ("Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983))).

³² *Id.* at 57 ("We 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985))).

³³ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) ("[W]e have recognized two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' . . . and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility . . .'" (first quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and then quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963))).

³⁴ *Arizona v. United States*, 567 U.S. 387, 399 (2012) ("State laws are preempted when they conflict with federal law.").

³⁵ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) ("We will find preemption where it is impossible for a private party to comply with both state and federal law . . . and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citations omitted)).

³⁶ *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."); *Arizona*, 567 U.S. at 399 ("States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting))).

federal courts also have imbued certain administrative agency outputs and Executive Branch actions with preemptive effect.³⁷

In the immigration enforcement context, this conventional articulation and application of the doctrine is complicated by two factors. First, federal courts have sometimes engaged in what scholars have termed constitutional, structural, or per se preemption.³⁸ In this immigration-specific federalism approach—that sounds in long-abandoned “dual federalism” ideas³⁹—state enactments that tread on the core of migration control are invalidated because they entrench upon an exclusively national area of control.⁴⁰ Second, federal executives have played, and continue to play, a central role in crafting law and policy.⁴¹ This substantial Executive Branch involvement has come to define the immigration enforcement policy, thereby diminishing the relevance of formal law. The contested ground, therefore, is whether and how presidential enforcement should inform preemption analysis and whether a bespoke immigration enforcement approach is constitutionally appropriate. As such, within each subpart, I highlight the role (or absence) of federal executive practice in influencing preemption analysis.

A. Arizona’s *Immigration Enforcement and Presidential Preemption*

By the late 2000s, Arizona became the locus of state enforcement efforts. The two major Arizona enactments from that period—the Legal Arizona Worker’s Act (LAWA) in 2008 and the Support Our Law Enforcement and Safe Neighbors Act, SB 1070, in 2010—continue to have lasting impact. While the Court’s preemption analysis of LAWA focused almost exclusively on statutory text, its analysis of SB 1070’s sweeping, omnibus enforcement provisions

³⁷ See generally Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012) (showing that federal agencies are now dominant players in preemption disputes); David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J. LAW & PUB. POL’Y 267, 268 n.1 (2015) (citing cases where the Supreme Court has found federal agencies preempted states).

³⁸ *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 765 (N.D. Tex. 2007) (“Since the power to regulate immigration is unquestionably exclusively a federal power, any state statute which regulates immigration is constitutionally prescribed.” (quoting *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995))); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 819–24 (2008).

³⁹ See Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in 55 NOMOS: FEDERALISM AND SUBSIDIARITY 34, 34–35 (James E. Fleming & Jacob T. Levy eds., 2014) (describing the concept of dual federalism and its notion of separate and distinct state and federal spheres).

⁴⁰ See Rubenstein & Gulasekaram, *supra* note 25, at 603–05; Huntington, *supra* note 38, at 821–24.

⁴¹ COX & RODRÍGUEZ, *supra* note 7, at 41–52.

invoked presidential enforcement practices.⁴² Because of LAWA's limited regulatory scope, the Court's rejection of most of SB 1070 was significantly more impactful.⁴³

LAWA sought to penalize businesses that hired unauthorized workers as a way to deter unauthorized employment, and by extension, unauthorized migration.⁴⁴ It did so by mandating employers in the state use the federal "E-Verify" system offered by the Department of Homeland Security, to check the status of every employee.⁴⁵ Arizona lawmakers couched the penalty for non-compliance as the revocation of a business license in the state, as opposed to monetary fines or other punitive measures.⁴⁶ This minor innovation proved to be legally significant in the Court's view. In *Chamber of Commerce v. Whiting*, a bare majority of the Supreme Court upheld LAWA reasoning that the Immigration Reform and Control Act contained a parenthetical exemption for state "licensing" and related laws, even though the remainder of the federal statute expressly preempted state penalties for unauthorized employment.⁴⁷

Whiting might be understood as a high-water mark for textualist approaches to enforcement preemption that avoid accounting for practical enforcement friction between state and federal systems.⁴⁸ After finding that the law was not expressly preempted—and to the contrary, was expressly saved—the Court looked only briefly to federal executive enforcement practice, solely for the purpose of rejecting the obstacle preemption claim.⁴⁹ Even though federal law forbade federal agencies from mandating E-Verify use, the Court declined to read that limit on federal enforcement as a limitation on other governmental actors' mandating use of the database.⁵⁰ Further, to buttress its conclusion that LAWA could not be an obstacle to accomplishing the aims of federal immigration law, the Court relied on the Department of Justice (DOJ)'s

⁴² *Arizona v. United States*, 567 U.S. 387, 393, 395–97, 424, 428, 434 (2012).

⁴³ See Melissa Hogan, Note, *The Shadow Spreads: Impact of S.B. 1070 and Trends in Modern Immigration Law*, 14 RUTGERS J.L. & RELIGION 551, 551–53 (2013).

⁴⁴ Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to -214 (2022)).

⁴⁵ ARIZ. REV. STAT. ANN. § 23-212(I) (2022); *Verify Employment Eligibility (E-Verify)*, U.S. DEP'T OF HOMELAND SEC., [https://www.dhs.gov/verify-employment-eligibility-e-verify#:~:text=E%2DVerify%20employers%20verify%20the,of%20Homeland%20Security%20\(DHS\)](https://www.dhs.gov/verify-employment-eligibility-e-verify#:~:text=E%2DVerify%20employers%20verify%20the,of%20Homeland%20Security%20(DHS)) [<https://perma.cc/WH3B-PBY9>] (Oct. 5, 2022) (federal government website explaining and allowing use of E-Verify system).

⁴⁶ ARIZ. REV. STAT. ANN. § 23-212(F) (2022).

⁴⁷ *Chamber of Com. v. Whiting*, 563 U.S. 582, 587, 611 (2011).

⁴⁸ *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1626 (2013) [hereinafter *Developments*].

⁴⁹ See MOTOMURA, *supra* note 21, at 120 (“[T]he Court’s implied preemption analysis relied heavily on its express preemption analysis.”).

⁵⁰ *Whiting*, 563 U.S. at 608.

representation that the federal government desired greater E-Verify use.⁵¹ A decade after *Whiting*, LAWA continues in effect even though it has resulted in exceedingly rare enforcement actions.⁵²

Senate Bill 1070, enacted two years after LAWA, expanded the scope and breadth of state enforcement, including, but also extending beyond, the context of workplace enforcement.⁵³ SB 1070's multiple provisions included section 2(B) that empowered police officers to demand proof of legal status from suspected unauthorized immigrants (the "show me your papers" provision), section 3 that created a state registration scheme, section 5C that penalized unauthorized migrants from soliciting employment (something Congress in enacting the Immigration Reform and Control Act (IRCA) had declined to do), and section 6 that purported to allow officers independent arrest authority based on the suspicion that a noncitizen was unlawfully present.⁵⁴ These four provisions would become the subject of *Arizona v. United States*.

On the one hand, *Arizona* might have been a much easier preemption case than it proved to be. The Court might have struck down SB 1070 in its entirety under a constitutional preemption theory given the state's expressed migration-control intent.⁵⁵ Section 1 of the law clearly explained the state's purpose:

The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.⁵⁶

⁵¹ *Id.* at 609–10 (citing the Brief for United States as Amicus Curiae, Chamber of Com. v. *Whiting*, 563 U.S. 582 (2011) (No. 09-115)).

⁵² Octavio Blanco, *In Arizona, the Mandated Use of E-Verify Has Had Mixed Results*, CNN (Feb. 28, 2017), <https://money.cnn.com/2017/02/28/news/economy/e-verify-immigration/index.html> [<https://perma.cc/T7FM-4LCM>] (reporting that between 2008 and 2013, only three businesses were prosecuted under LAWA, and all received the minimum statutory punishment of temporary license suspension).

⁵³ See Support Our Law Enforcement and Safe Neighborhoods Act, Senate Bill 1070, ch. 113, 2010 Ariz. Sess. Laws 2d Reg. Sess. 450 (codified in scattered sections of ARIZ. REV. STAT. ANN.) (preempted in part by *Arizona v. United States*, 567 U.S. 387 (2012)).

⁵⁴ *Id.*

⁵⁵ See Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1594–97 (2019) (arguing that state intent should be evaluated in immigration federalism decisions); Guttentag, *supra* note 6, at 8–9; Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 638 (2013).

⁵⁶ § 1, 2010 Ariz. Sess. Laws 2d Reg. Sess. at 450.

Throughout litigation, however, the federal courts and the Supreme Court declined to interpret the various provisions of the state law with the taint of the immigration-deterrence purpose articulated in section 1.⁵⁷

On the other hand, evaluated under conventional preemption analysis, SB 1070 presented difficult questions. In some ways, SB 1070 represented a significant change from unsuccessful past state efforts like Prop 187 or Texas's attempt to deny public education to unauthorized children.⁵⁸ The law's drafters avoided California's fatal error with Prop 187 of concocting state level definitions for unlawful presence.⁵⁹ And, Arizona based its legal defense on statements from prior immigration federalism cases that seemed to suggest that state law that "mirrored" federal law and relied on federal immigration categories, would survive preemption analysis.⁶⁰ The workers sanctions provision, for example, created state level penalties tied to federal definitions of unauthorized workers; and since the state was regulating employment, Arizona officials likely believed the provision would be upheld like the policies in *De Canas v. Bica* from three decades prior and *Whiting* from just a year prior.⁶¹

These modifications proved insufficient to survive field and obstacle preemption scrutiny.⁶² Keying on those forms of implied preemption, the federal government's legal theory in *Arizona* appeared to herald a new era of enforcement preemption.⁶³ Other than representing a rare instance of muscular

⁵⁷ *United States v. Arizona*, 703 F. Supp. 2d 980, 993 (D. Ariz. 2010) ("While Section 1 of S.B. 1070 provides a statement of the Act's intent and purpose, it does not create a single and unified statutory scheme incapable of careful provision by provision analysis."), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012); *United States v. Arizona*, 641 F.3d 339, 367 (9th Cir. 2011) (Noonan, J., concurring) ("[In regard to section 1 of SB 1070, i]t would be difficult to set out more explicitly the policy of a state in regard to aliens unlawfully present . . . Without qualification, Arizona establishes its policy on immigration."), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012).

⁵⁸ See *infra* Part II.B.

⁵⁹ See *infra* Part II.B and notes 134–35.

⁶⁰ *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("As we recognized in *De Canas v. Bica*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." (citation omitted) (citing *De Canas v. Bica*, 424 U.S. 351 (1976))); Margaret Hu, *Reverse Commandeering*, 46 U.C. DAVIS L. REV. 535, 591–92 n.247 (2012).

⁶¹ As Adam Cox and Cristina Rodríguez chronicle, even DOJ lawyers under President Obama had come to similar legal conclusions and were skeptical about the federal government's chance of success in a preemption suit. COX & RODRÍGUEZ, *supra* note 7, at 150–51. As those federal government lawyers understood it, the state appeared to be engaging in immigration enforcement in ways that were complementary to, and redundant with, federal immigration law. Such redundancy between federal and state systems is par for the course in other regulatory areas. Cox, *supra* note 22, at 31.

⁶² *Arizona v. United States*, 567 U.S. 387, 399 (2012).

⁶³ See *id.* at 401–02.

presidential challenge to state law,⁶⁴ the DOJ also directly inserted the Executive Branch into preemption analysis. Instead of relying solely on congressional intent as reflected in the legislative text, the DOJ's theory in part was premised on defining federal policy through executive discretion and enforcement practices.⁶⁵ Ultimately, the 5–3 opinion in *Arizona*⁶⁶ invalidated three out of four challenged provisions of SB 1070, finding those provisions preempted, using a mixture of familiar implied preemption methodologies and seemingly novel approaches that relied on federal enforcement decisions.⁶⁷

The Court's analysis of section 3, for example, partly relied on the familiar doctrine of field preemption, ruling that the federal registration scheme occupied the field and left no room for concurrent state regulation.⁶⁸ The remainder of the court's analysis, however, mixed in ideas of executive discretion and federal monopoly over enforcement decisions.⁶⁹ The opinion went on to suggest that even had Congress not occupied the field, state penalties for registration violations could not stand.⁷⁰ Arriving at that conclusion required the Court to focus on the president's decision to decline to vigorously prosecute the federal

⁶⁴ The federal government's suit marked only the third time the DOJ had litigated against a state immigration provision as the suing party. Prior to *Arizona*, the first was the Theodore Roosevelt Administration's lawsuit against San Francisco's segregation policy in public schools against Japanese immigrant schoolchildren. COX & RODRÍGUEZ, *supra* note 7, at 37–38. One hundred years later, and just a few years before *Arizona*, the federal government sued the state of Illinois, after the state enacted a law prohibiting employers from enrolling in E-Verify. *United States v. Illinois*, No. 07–3261, 2009 WL 662703, at *1–2 (C.D. Ill. Mar. 12, 2009). In neither of those prior instances did the case get beyond the district court. Moreover, Illinois's law mitigated federal workplace efforts, rather than enhancing them. *Id.* at *2. To be sure, even had the federal government not sued the state, Arizona's SB 1070 would still have faced legal challenges from individuals and organizations, some of which made similar preemption claims. *See, e.g., Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 8021265, at *1–2 (D. Ariz. Sept. 5, 2012), *aff'd sub nom., Valle del Sol, Inc. v. Whiting* 732 F.3d 1006 (9th Cir. 2013).

⁶⁵ Brief for Respondent United States at 17–22, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182).

⁶⁶ Justice Kagan did not take part in the opinion. *Arizona*, 567 U.S. at 416. In addition, one provision—the registration provision in section 3—was invalidated 6–2, with Justice Alito joining the majority. *Id.* at 450 (Alito, J., concurring in part and dissenting in part).

⁶⁷ *Arizona*, 567 U.S. at 416 (majority opinion).

⁶⁸ *Arizona*, 567 U.S. at 400–03. *But see id.* at 452 (Alito, J., concurring in part and dissenting in part, and critiquing field preemption methodology) (“With any statutory scheme, Congress chooses to do some things and not others. If that alone were enough to demonstrate pre-emptive intent, there would be little left over for the States to regulate This explains why state laws implicating traditional state powers are not preempted unless there is a ‘clear and manifest’ congressional intention to do so.”).

⁶⁹ *E.g., Arizona*, 567 U.S. at 397 (majority opinion).

⁷⁰ *Id.* at 402 (“Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law.”).

registration requirements.⁷¹ As Professor Daniel Meltzer suggests, these additional considerations permitted the majority to incorporate the president's enforcement of immigration law, thereby letting federal enforcement practice set the "floor and ceiling" of federal policy.⁷²

Similarly, in enjoining section 5C, the Court expressed a preference for federal enforcement monopoly. The Court struck down that provision (criminalizing the solicitation of work by unauthorized noncitizens) because federal law focused its penalties on employers, and did not contemplate penalizing workers.⁷³ As the Court noted, Congress had considered punishing employees, but jettisoned the idea in the final version of IRCA.⁷⁴ To the extent such actions indicated a general congressional intent, the *Arizona* majority's reasoning was consistent with the approach taken by the Court in other implied preemption cases.⁷⁵ Notably, however, the Court's theory read Congress' decision to exclude employees from federal sanction as binding on states as well.⁷⁶

The Court's analysis of section 6 most clearly incorporated executive enforcement discretion, with the opinion expressly focusing on the tension between state law and federal enforcement by the Department of Homeland Security (DHS).⁷⁷ To discern federal policy, the majority cited to DHS's enforcement memoranda which highlighted the limited enforcement capacity of the federal system and specified priority categories for enforcement within that limit.⁷⁸ Noting that SB 1070 would shuttle more immigrants into the federal

⁷¹ See Kim, *supra* note 6, at 706.

⁷² Meltzer, *supra* note 20, at 10–11.

⁷³ *Arizona*, 567 U.S. at 406 ("The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.").

⁷⁴ *Id.* at 405 ("The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.").

⁷⁵ *Id.* at 401 ("The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration.").

⁷⁶ *Id.* at 405 ("IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives.").

⁷⁷ *Id.* at 408 ("This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy.").

⁷⁸ *Arizona*, 567 U.S. at 407–08.

system without regard to those federal priorities or system capacity, the majority struck down a critical provision of the state law.⁷⁹

As Dean Kerry Abrams points out, this connection was by no means inevitable.⁸⁰ While state arrests might form the initial step that leads to removal, several discretionary decisions and legal processes separate the state arrest from federal immigration consequences.⁸¹ Yet, the Court understood that in immigration law, multiple factors and discretionary enforcement choices—beyond formal law—define federal policy.⁸²

This focus on the immigration enforcement system as a whole—not only federal law but the level and manner of enforcement of that law by the Executive—was not lost on dissenting justices, including Justice Alito who was aghast at the notion:

The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy have pre-emptive force.⁸³

In his partial dissent, he complained that immigration enforcement should be treated like other forms of preemption, allowing enforcement redundancy between federal and state authorities.⁸⁴ In addition, he charged that the majority had ignored the “presumption against preemption” that courts should apply in federalism cases.⁸⁵

Despite the majority's focus on the enforcement priorities of executive agencies, it nevertheless upheld section 2(B) (the “show me your papers” provision) of SB 1070.⁸⁶ That victory for the state proved to be short-lived. The

⁷⁹ *Id.* at 410 (“By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress.”).

⁸⁰ See Abrams, *supra* note 55, at 627–29.

⁸¹ *Id.* But see Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil—Criminal Line*, 58 UCLA L. REV. 1819, 1853–54 (2011) (considering the possibility that state arrests put political pressure on federal authorities and tend towards greater removal in practice).

⁸² See Motomura, *supra* note 81, at 1857.

⁸³ *Arizona*, 567 U.S. at 445 (Alito, J., concurring in part and dissenting in part).

⁸⁴ *Id.* at 455–57.

⁸⁵ *Id.* at 451 (“The Court gives short shrift to our presumption *against* pre-emption. Having no express statement of congressional intent to support its analysis, the Court infers from stale legislative history and from the comprehensiveness of the federal scheme that ‘Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.’”).

⁸⁶ *Id.* at 411–15 (majority opinion).

Court's opinion left open the possibility that, as applied, the provision might lead to discriminatory enforcement and detention of suspected unauthorized immigrants longer than justified for state enforcement purposes.⁸⁷ In subsequent litigation, advocacy organizations pressed the as-applied challenge, eventually leading to a settlement with the Arizona Attorney General, with the state agreeing not to enforce the section.⁸⁸

B. Prior State Enforcement Efforts and Arizona's Unexceptionality

In the wake of *Arizona*, many scholarly appraisals suggested that the majority's preemption approach was surprising, or different, or bespoke.⁸⁹ In comparison, I have thus far characterized the majority's view only as *seemingly* novel. Certainly, the Court's explicit acknowledgement of executive enforcement practice and citations to enforcement guidance was notable and new. On closer examination, however, *Arizona* fits into a consistent narrative with foundational cases like *De Canas v. Bica* and *Plyler v. Doe*, which predated *Arizona* by several decades. To various degrees, they all view presidential enforcement practices as a relevant consideration—arguably, the dispositive one—in determining the leeway for state and local regulations.

Writing in the wake of *Arizona*, Kerry Abrams dubbed the Court's methodology “plenary power preemption,” identifying a mode of analysis whereby federal courts prime their federalism discussion with paeans to federal authority over immigration.⁹⁰ She suggests that one reason plenary power preemption persists is that much immigration policy is created by the Executive Branch through regulations, memoranda, and prosecutorial discretion; in response, courts can use “plenary power preemption” to account for the

⁸⁷ See *id.* at 414–15.

⁸⁸ See Office of the Att’y Gen. of Ariz., Informal Att’y Gen. Opinion No. I16-010: Re: Advisory Model Policy for Law Enforcement Applying SB 1070, at 2 (Sept. 20, 2016), <https://www.azag.gov/sites/default/files/2018-06/I16-010.pdf> [<https://perma.cc/M2KE-HFXK>]; Michael Kiefer, *Arizona Settles Final Issues of SB 1070 Legal Fight*, AZ CENTRAL (Sept. 15, 2016), <https://www.azcentral.com/story/news/politics/immigration/2016/09/15/arizona-settlement-sb-1070-lawsuit-aclu-immigration/90424942/> [<https://perma.cc/6PCT-HLP7>].

⁸⁹ See, e.g., Meltzer, *supra* note 20, at 4 (describing *Arizona*'s approach as a “muscular” version of implied preemption); Kim, *supra* note 6, at 694 (describing *Arizona* as using an “unprecedented” preemption approach); Abrams, *supra* note 55, at 602–03 (describing *Arizona* as having used a murky and obscuring “plenary power preemption”); Peter Spiro, *Supreme Court (Mostly) Guts S.B. 1070*, SCOTUSBLOG (June 25, 2012), <https://www.scotusblog.com/2012/06/supreme-court-mostly-guts-s-b-1070/> [<https://perma.cc/84CV-MT3R>] (“The decision here continues a tradition of immigration law exceptionalism.”).

⁹⁰ Abrams, *supra* note 55, at 603–05.

Executive's substantial policymaking power, without having to decide thorny constitutional questions over the source or scope of executive authority.⁹¹

Abrams makes a persuasive case that courts are likely shying away from pinning down the sources and boundaries of executive immigration authority. My suggestion here is that despite that reluctance, modern enforcement federalism cases have consistently incorporated the Executive's potential for enforcement, perhaps as an implicit rejection of the idea that preemption doctrine is the proper venue to resolve intractable separation of powers disputes. In modern enforcement federalism, courts have always measured state law against executive enforcement and practice, and not just the nebulous and sometimes conflicting goals of the immigration code.

The modern story of enforcement federalism begins with California's labor code changes in 1971 and Texas's restrictions on public school education in 1975.⁹² For purposes of this Article, I define California's and Texas's enactments in the 1970s through the 1990s, as well other states' laws in that same time period, as the beginning of the relevant era⁹³ because they postdate the historic 1965 Amendments to the Immigration and Nationality Act (INA).⁹⁴ Those 1965 amendments, and further INA modifications in the 1980s and 1990s primarily define the statutory parameters of enforcement in force today.⁹⁵ In

⁹¹ *Id.* at 635–37. In addition, Abrams contends that “plenary power preemption” permits the court to account for discrimination concerns and effects on vulnerable minority populations without having to invoke the equal protection clause expressly. *Id.* at 637–39.

⁹² CAL. LAB. CODE § 2805 (West 1971) (repealed 1988); *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

⁹³ Of course, state and local regulation of immigration, and federal court review of the same, long-predated California's and Texas's enactments. In the first century of the republic, states and localities were the primary, if not sole, regulators of immigration. Gerald Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993). And even post-Civil War, as the federal government began regulating immigration in earnest, state enforcement policies continued, even if many were struck down. *See Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 374 (1886). That pattern continued through the early and mid-twentieth century as well. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 413 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 73–74 (1941) (striking down Alien Registration Act adopted by the Commonwealth of Pennsylvania); *Oyama v. California*, 332 U.S. 633, 635–36, 647 (1948) (constitutional challenge to California Alien Land Law); *Zschernig v. Miller*, 389 U.S. 429, 430 (1968) (challenging Oregon statute which provides for escheat in cases where a nonresident alien claims real or personal property); *Purdy & Fitzpatrick v. State*, 456 P.2d 645, 650 (Cal. 1969) (challenging CAL. LAB. CODE § 1850, which prohibited employment of aliens in public works).

⁹⁴ *See* GULASEKARAM & RAMAKRISHNAN, *supra* note 4, at 41–56 (describing 1965 through the late 2000s as a third era of immigration federalism).

⁹⁵ *See generally* Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (original Immigration and Nationality Act, codified in various parts of Title 8 of the U.S. Code); Immigration and Nationality Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); Immigration and Nationality Act, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

addition, in the years after the 1965 amendments, avenues for legal migration into the United States from Mexico and other western hemisphere countries were severely restricted.⁹⁶ Yet, the entrenched family networks, labor patterns, and geographic connections between the United States and those countries from prior decades persisted.⁹⁷ As a result, migration that was once lawful or unregulated, became unlawful.⁹⁸ And, important to this Article, employment that had become routine and relied upon, became unauthorized.⁹⁹ Moreover, because Congress has not comprehensively changed admissions criteria and caps, or enforcement provisions for at least one-quarter of a century, judicial responses to state policies from the past four decades all retain significant relevance.

Between the 1965 Amendments and *Arizona* in 2012, only two cases reaching the Supreme Court focused on state regulation of undocumented migrants:¹⁰⁰ *De Canas v. Bica* (1976) and *Plyler v. Doe* (1982); another, *Toll v. Moreno* (1982), addressed state burdens on nonimmigrants.

In 1971, California became the locus of state immigration enforcement efforts when it enacted a labor code provision, penalizing employers for hiring unauthorized workers.¹⁰¹ A group of authorized workers brought action in state court against farm labor contractors, alleging that those employers had hired unauthorized workers in violation of the labor law.¹⁰² The private contractors defended on the basis that the state law was preempted. Although the state courts

⁹⁶ See Immigration and Nationality Act, Pub. L. No. 89-236, § 9, 79 Stat. 911, 917 (1965).

⁹⁷ See generally Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 2–5 (2012); KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (chronicling the end of the Bracero program and its effects).

⁹⁸ Massey & Pren, *supra* note 97, at 5 (“In sum, illegal migration rose after 1965 not because there was a sudden surge in Mexican migration, but because the temporary labor program had been terminated and the number of permanent resident visas had been capped, leaving no legal way to accommodate the long-established flows.”).

⁹⁹ See Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 652 (2000) (“With the passage of IRCA, Congress sought to reduce illegal immigration by imposing employer sanctions for hiring undocumented workers.”).

¹⁰⁰ Several other cases involving state regulation of lawfully present noncitizens, especially with regards to welfare denial or exclusion from certain professions or jobs reached the Supreme Court as well. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (striking down state statutes denying welfare benefits to lawful permanent residents); *Sugarman v. Dougall*, 413 U.S. 634, 646–47 (1973) (striking down New York law excluding noncitizens from becoming civil service employees). In addition, the Court upheld Arizona’s employer sanctions law in 2011. *Chamber of Com. v. Whiting*, 563 U.S. 582, 583 (2011).

¹⁰¹ CAL. LAB. CODE § 2805 (West 1971) (repealed 1988).

¹⁰² *De Canas v. Bica*, 424 U.S. 351, 353 (1976).

agreed,¹⁰³ the Supreme Court reversed in *De Canas v. Bica*,¹⁰⁴ one of the first and most influential decisions of the modern era of immigration federalism. The Court upheld the state's penalties for unauthorized employment, famously stating:

[The] power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised. . . . [E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, *absent congressional action*, [the state employer sanctions law] would not be an invalid state incursion on federal power.¹⁰⁵

Despite the sweeping rhetoric, the centerpiece of the Court's analysis established only that the state law was not constitutionally (or *per se*) preempted, by virtue of its connection to immigration status.¹⁰⁶ Having narrowed the scope of constitutional preemption in immigration, the remainder of the opinion focused on the more familiar statutory analysis typical of preemption cases in other regulatory areas. On this score, the Court focused on the lack of federal regulation regarding unauthorized employment.¹⁰⁷ Ultimately, the Court remanded the case to the state court on the question whether the California labor law conflicted with the INA or other federal laws.¹⁰⁸

In *De Canas*'s dispute between potential employees and employers, federal enforcement practices seemed to play little, if any, role, at least in so far as explicit references to presidential priorities or practices. The extant federal statutory and enforcement scheme explains this omission. Like today, federal law at that time stated that only those with the appropriate immigration status or with work authorization could be employed.¹⁰⁹ In stark contrast to present day, however, the 1970s federal immigration code did not prohibit or punish employment of unauthorized workers,¹¹⁰ and statutory anti-harboring

¹⁰³ *De Canas v. Bica*, 115 Cal. Rptr. 444, 447 (1974), *rev'd*, 424 U.S. 351 (1976).

¹⁰⁴ *De Canas*, 424 U.S. 351, 365 (1976).

¹⁰⁵ *Id.* at 354–56 (second emphasis added) (citations omitted).

¹⁰⁶ *Huntington*, *supra* note 38, at 821–22.

¹⁰⁷ *De Canas*, 424 U.S. at 357–59.

¹⁰⁸ *Id.* at 364–65.

¹⁰⁹ *Developments*, *supra* note 48, at 1609–11; *see* 8 C.F.R. § 214.1(e) (1952).

¹¹⁰ 8 C.F.R. § 214.1(e) (1952); *see also* 8 C.F.R. § 212.1 (1952); 8 C.F.R. § 214.2(a) (1952). Unauthorized employment, however, might reveal immigration status, which could have subjected the noncitizen to removal or other immigration concerns. *See, e.g., Developments*, *supra* note 48, at 1610 n.12 (citing *Wei v. Robinson*, 246 F.2d 739, 746 (7th Cir. 1957)); Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 1, 2005), <https://www.migrationpolicy.org/article/declining-enforcement->

provisions were not applied to unauthorized employment.¹¹¹ In essence then, the background statutory scheme was not designed for *any* federal enforcement of unauthorized employment; thus the President could not help define the limits of federal workplace enforcement policy.

Seen through this lens, *De Canas* only weakly stands for the proposition for which it is often cited by some commentators and judges like Alito: namely, that states possess independent immigration enforcement authority in the absence of explicit and specific congressional disapproval.¹¹² At the time, there was no way in which the federal executive meaningfully could participate in, or exercise discretion over, workplace enforcement other than through deportation prosecutions if a worker's unauthorized status was discovered. *De Canas* then is consistent with the claim that modern enforcement federalism cases account for executive enforcement practices. At most, it stands for the principle that states may enforce state laws against noncitizens for immigration-related concerns when Congress has failed to provide for a federal enforcement scheme. Even under an *Arizona*-style jurisprudence then, California's 1971 employer sanctions would likely survive.¹¹³

In the years following California's enactment and *De Canas*, eleven other states passed similar employer sanctions laws intended to deter unauthorized employment.¹¹⁴ Eventually, in 1986, Congress passed the Immigration Reform

employer-sanctions [<https://perma.cc/3CJL-RTBQ>] ("Prior to 1986, there was no federal law prohibiting the hiring or employment of unauthorized aliens.").

¹¹¹ Brownell, *supra* note 110; see also *Developments*, *supra* note 48, at 1609 n.8 (noting that while Congress in 1974 amended farm labor law to prohibit unauthorized employment, it did not punish most employers for unauthorized employment until 1986).

¹¹² See *Arizona v. United States*, 567 U.S. 387, 450–51 (Alito, J., concurring in part and dissenting in part) (arguing that the majority's views on section 5C were inconsistent with *De Canas*).

¹¹³ Indeed, this reading of *De Canas* becomes even more persuasive if one takes seriously the Supreme Court's view of *De Canas* in *Toll v. Moreno*, decided a few years later. *Toll v. Moreno*, 458 U.S. 1, 9–10 (1982) (striking down, as impliedly preempted, state policy of denying in-state tuition benefits to a class of lawfully present nonimmigrants). The Supreme Court in *Toll* suggested that the Court reached its result in *De Canas* because the INA affirmatively allowed subfederal involvement at that time, and not simply because the immigration code failed expressly to prohibit it. *Id.* at 13 n.18 ("In *De Canas*, we considered whether a California statute making it unlawful in some circumstances to employ *illegal* aliens was invalid under the Supremacy Clause. . . . Justice Rehnquist's dissent in the present case suggests that the preemption claim was rejected in *De Canas* because 'the Court found no strong evidence that Congress intended to preempt' the State's action. Justice Rehnquist has misread *De Canas*. We rejected the preemption claim not because of an absence of congressional intent to preempt, but because Congress *intended* that the States be allowed, 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens.'" (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)) (citations omitted)); Guttentag, *supra* note 6, at 40 (calling attention to *Toll*'s reading of *De Canas*).

¹¹⁴ See *Developments*, *supra* note 48, at 1610–11; Albert Kutchins & Kate Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented*

and Control Act (IRCA), which implemented a federal employer sanctions scheme and preempted existing state employer sanctions laws.¹¹⁵ As Part II.A notes, the Court relied on a hypertextual reading of the express preemption provision to uphold LAWA in 2010. Importantly, IRCA also declined to punish unauthorized immigrants for seeking employment, focusing its penalties on the employers.¹¹⁶

A few years after *De Canas*, *Toll* and *Plyler*, both decided in the same term and both focused on access to education, elaborated the principle that federal enforcement practices matter for preemption analysis. In *Toll*, the Court struck down as preempted a state policy of denying in-state tuition benefits to a particular class of lawfully present nonimmigrants.¹¹⁷ Importantly, no provision of federal law expressly prohibited the state from imposing more burdensome tuition requirements on those nonimmigrants; moreover, the state tuition law did not prevent those nonimmigrants from living in the state or otherwise attending public universities.¹¹⁸ The Court reasoned, however, that because federal law had facilitated the presence of the noncitizens in the country, the state therefore was forbidden from burdening them with additional state penalties.¹¹⁹

Workers, 5 INDUS. RELS. L.J. 339, 347–48 & n.43 (1983) (citing labor laws of Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, and Virginia).

¹¹⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3360, 3368 (codified in various sections of Title 8 of the U.S. Code). IRCA included the now-familiar “I-9” form that all employers in the U.S. are required to complete for new hires. 8 U.S.C. § 1324a(b)(1)(A); *Form I-9 Statutes and Regulations*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9-central/form-i-9-resources/statutes-and-regulations> [<https://perma.cc/274P-ZRJF>]. In addition, it created a process by which employers became the primary regulators of unauthorized employment. *Chamber of Com. v. Whiting*, 563 U.S. 582, 589 (2011) (IRCA requires employers to take steps to verify an employee’s eligibility for employment). As per IRCA, the federal government would enforce its prohibitions on unauthorized employment primarily by auditing employers. 8 U.S.C. § 1324a(e)(1). Relevant to federalism questions, IRCA’s enactment expressly preempted state level employer sanctions laws, including California’s. 8 U.S.C. 1324a(h)(2) (prohibiting states from imposing “civil or criminal sanctions (other than through licensing and similar laws)” on employers).

¹¹⁶ 8 U.S.C. § 1324a(f)(1); *see also Arizona v. United States*, 567 U.S. 387, 405 (2012) (“The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.”).

¹¹⁷ *Toll*, 458 U.S. at 17 (“We therefore conclude that insofar as it bars domiciled G-4 aliens (and their dependents) from acquiring in-state status, the University’s policy violates the Supremacy Clause.”).

¹¹⁸ Brief for Petitioners at 4–7, *Toll*, 456 U.S. 1 (1981) (No. 80-2178).

¹¹⁹ *Toll*, 458 U.S. at 12–13 (“[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes

Specifically addressing unauthorized migrants, *Plyler* extended *Toll*'s logic further to include *implicit*—or to use the Court's word, "inchoate"—federal consent to noncitizens' presence based on lax enforcement practice.¹²⁰ In *Plyler*, the Supreme Court struck down Texas's 1975 law authorizing schools to deny free public education to unlawfully present schoolchildren.¹²¹ Although formally decided on equal protection grounds,¹²² the majority opinion was deeply informed by—if not wholly dependent on—the federal government's enforcement choices. The *Plyler* majority stressed the federalism dimension of its analysis throughout its opinion, looking to the realities of federal enforcement to set the terms of permissible state intervention.¹²³

additional burdens not contemplated by Congress.” (quoting *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976))).

¹²⁰ *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

¹²¹ *Id.* at 230.

¹²² Indeed, the Court stated that it was avoiding preemption analysis, and instead, focused on the fit between the state's asserted rationales and the relationship between those goals and the state's decision to deny a free public education to undocumented children. *Id.* at 210 n.8; see also Michael A. Olivas, *Plyler v. Doe*, *Toll v. Moreno*, and *Postsecondary Admissions: Undocumented Adults and "Enduring Disability"*, 15 J.L. & EDUC. 19, 22–25 (1986).

¹²³ See *Plyler*, 457 U.S. at 218 (“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”); see also MOTOMURA, *supra* note 21, at 137.

In addition to executive's enforcement practices, *Plyler* featured quirky and interesting litigation involvement by the federal executive branch. When the case was initially accepted, the Carter Administration, writing amicus, strongly supported the noncitizen-petitioner's claim that Texas' law violated the constitution's Equal Protection and Supremacy Clauses. The case, however, was held over until the Reagan Administration. When the Reagan DOJ weighed in, it shifted the federal government's position, clarifying that it did not believe that the state law was preempted by federal law. Linda Greenhouse, *An Old Supreme Court Dream*, Opinion, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/opinion/supreme-court-immigration.html> [<https://perma.cc/5EUT-XHTM>]. Importantly, even in this subsequent filing, the DOJ maintained the position that undocumented children were covered by the Fourteenth Amendment's Equal Protection Clause. This position may have proved critical, as the Court ultimately concluded that Texas' policy invidiously discriminated against unlawfully present immigrant children. Notably, then-Special Assistant U.S. Attorney (now-Chief Justice) John Roberts—lamented the DOJ's tepid involvement. In his contemporaneous assessment, he suggested that had the DOJ weighed in more forcefully, the Court may have been more inclined to rule for the state of Texas. See generally Memorandum from John Roberts & Carolyn B. Kuhl to the Attorney General, *Plyler v. Doe*—“The Texas Illegal Aliens Case” (June 15, 1982), <https://www.archives.gov/files/news/john-roberts/accession-60-98-0832/036-chron-file-3-1-82-8-31-82/folder036.pdf> [<https://perma.cc/N8RP-K6W7>] (arguing that Justice Powell could have been persuaded to join the dissenters).

Bounding Justice Brennan's analysis is the practical reality that federal immigration enforcement efforts and policy discretion would likely result in the continued presence of the undocumented children Texas chose to penalize:

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.¹²⁴

According to the majority, because federal enforcement practices (or lack thereof) would likely result in unlawfully present children remaining in Texas, the state was prohibited from further penalizing them and creating a "permanent . . . underclass."¹²⁵

In short, understood through a federalism lens, *Plyler* stands for the principle that state policies that are at odds with—are "obstacles" to—presidential enforcement of immigration law cannot stand, even when the state views federal enforcement as lax or ineffective.¹²⁶ Accordingly, the *Plyler* majority rejected the state's argument that the literal prohibitions of the immigration code exclusively defined federal policy.¹²⁷ Something more—namely, the enforcement practices of the Executive Branch when Congress provided the authority for federal enforcement—mattered for determining the viability of state enforcement efforts.

In addition to these Supreme Court precedents, one final state enforcement effort and its legal demise in federal court deserves mention. By the early 1990s, faced with an economic recession, and buoyed by a gubernatorial candidate who

¹²⁴ *Plyler*, 457 U.S. at 226 (citations omitted); *id.* at 218–19 ("Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a 'shadow population' of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." (footnotes omitted)).

¹²⁵ *Id.* at 218–19 ("This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.").

¹²⁶ *See id.* at 222.

¹²⁷ *Id.* at 224–25.

seized upon the economic threat of unauthorized migrants, California voters passed a comprehensive enforcement measure that sought to cut undocumented immigrants out of several state programs and benefits, and called on state and local agencies to investigate and report immigration violators.¹²⁸ The measure clearly seemed designed to overturn *Plyler*,¹²⁹ while simultaneously expanding the rationale of *De Canas* to allow states to deter unauthorized migration by restricting a variety of state programs. Centrally relevant to this Article, as Professor Rick Su points out, the provisions of Prop 187 “imagined a system of complementary enforcement in which state and local officials could be used to greatly expand the enforcement capabilities of the federal government” and “advanced a vision of immigration policymaking in which states, and not just the federal government, would play a central role.”¹³⁰

This transformative vision, however, was rejected. A district court rebuffed a central role for states in immigration enforcement when it twice-enjoined Prop 187, once prior to major federal legislative changes to enforcement in 1996, and then again after those amendments to the INA.¹³¹ The district court declined to overrule *Plyler*, thus quickly disposing of the public education provision.¹³² In

¹²⁸CAL. PROPOSITION 187: ILLEGAL ALIENS. INELIGIBILITY FOR PUBLIC SERVICES. VERIFICATION AND REPORTING. INITIATIVE STATUTE. 50 (1994); Kevin R. Johnson, *Proposition 187 and its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859, 1866–69 (2020).

¹²⁹Memorandum from Walter Dellinger, Assistant Att’y Gen., to the Att’y Gen. of the U.S., *Constitutionality of Section 7 of California Ballot Initiative Proposition 187* (Oct. 27, 1994) (on file with author) (“This provision in Section 7 [of Prop 187] is in all material respects indistinguishable from the Texas statute that the Supreme Court held to be in violation of the Equal Protection Clause . . . in *Plyler v. Doe* . . .”).

¹³⁰Rick Su, *The First Anti-Sanctuary Law: Proposition 187 and the Transformation of Immigration Enforcement*, 53 U.C. DAVIS L. REV. 1983, 1990–91 (2020).

¹³¹*See generally* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 764 (C.D. Cal. 1995) (preliminary injunction), *on reconsideration in part*, 997 F.Supp. 1244 (C.D. Cal. 1997); League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (permanent injunction after reconsideration in light of 1996 federal immigration enactments). The state later settled the case without appeal.

¹³²*Wilson*, 908 F. Supp. at 785–86. The federal DOJ under President Clinton also released a memo strongly criticizing the state’s restriction of public school, citing *Plyler*. Prior to enactment, President Clinton was a vocal critic of Prop 187, even as he later signed several enforcement-heavy federal laws into effect, which allowed the state to accomplish some of what it tried to do with Prop 187. Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today’s Immigration Problem*, VOX (Apr. 28, 2016), <https://www.vox.com/2016/4/28/11515132/irra-clinton-immigration> [<https://perma.cc/8MTD-C96X>]; Ronald J. Ostrow, *U.S. Justice Department Memo Assails Prop. 187: Election: Administration’s Latest Broadside Compares the Measure to a Texas Law Declared Unconstitutional*, L.A. TIMES (Oct. 28, 1994), <https://www.latimes.com/archives/la-xpm-1994-10-28-mn-55838-story.html> [<https://perma.cc/3Z8Y-ULJG>].

enjoining the sections on other public benefits,¹³³ the court used a mixture of constitutional preemption and implied preemption rhetoric,¹³⁴ but keyed its analysis on the state's concoction of its own immigration categories, which did not correspond to federal definitions.¹³⁵ This aspect of *LULAC v. Wilson* endures to this day, with state and local policies that autonomously determine immigration status and impose liability based on those definitions, are outlawed.¹³⁶

Although both of California's innovative attempts at state level enforcement were rebuffed by subsequent federal laws (IRCA), and by a federal court in light of federal law (in the Prop 187 case), and Texas's effort was stymied by the Supreme Court (*Plyler*), these efforts laid the groundwork for Arizona's renewed efforts at enforcement in the late 2000s.¹³⁷ Despite this shift in state enforcement geography, however, the basics of the judicial approach to immigration preemption remained the same.

In the decades prior to Arizona's efforts, *De Canas*, *Toll*, and *Plyler* set the stage for the *Arizona* Court's use of a federal-enforcement-practice-centered paradigm in preemption analysis. *Arizona* then, is novel only in so far as it explicitly identifies that executive enforcement practice matters in determining conflicts with state policy. But, its consideration of federal enforcement practices as setting the outer bounds of federal policy essentially distilled the Court's prior approach in immigration enforcement matters.

C. Kansas's Novel Rejection of Presidential Enforcement

For eight years hence,¹³⁸ *Arizona* remained the prevailing jurisprudence on enforcement federalism and seemed to settle the question of whether and how

¹³³ The initial district court opinion was written prior to the enactment of the 1996 federal welfare reform act and 1996 immigration reforms. After those enactments, the state sought reconsideration of the preliminary injunction, but the district court ultimately ruled that the 1996 federal laws still preempted Prop 187. *Wilson*, 997 F. Supp. at 1261.

¹³⁴ See, e.g., *Wilson*, 908 F. Supp. at 771 ("The sole stated purpose and the sole effect of section 4 is to impermissibly regulate immigration. Accordingly, section 4 is entirely preempted by federal law under the first *De Canas* test.").

¹³⁵ *Id.* at 770 ("Unlike the statute at issue in *De Canas*, which adopted *federal standards* to determine whether an individual's immigration status subjected an employer to liability, Proposition 187's classification provisions create an entirely *independent* set of criteria by which to classify individuals based on immigration status.").

¹³⁶ See *id.* at 771–74.

¹³⁷ See *supra* Part II.A.; GULASEKARAM & RAMAKRISHNAN, *supra* note 4, at ch. 3.

¹³⁸ In subsequent litigation against SB 1070 and its copycats, the DOJ maintained its position against state regulation of noncitizens in the employment context. One section of LAWA specified that the state crime of "aggravated identity theft" applied to those trying to obtain employment. Legal Arizona Workers Act, ch. 279, § 1, 2007 Ariz. Sess. Laws 1312, 1312 (codified as amended at ARIZ. REV. STAT. ANN. § 13-2009). In litigation over that provision in *Puente Arizona v. Arpaio*, the DOJ's amicus brief argued that the state laws

states could engage in immigration-related prosecutions. The election of Donald Trump, however, was the harbinger of a dramatic shift in enforcement federalism.¹³⁹ With his administration openly hostile to sanctuary policies¹⁴⁰ and encouraging of hyper-enforcement policies,¹⁴¹ state level restrictionism returned to favor. For example, emboldened by the federal government's anti-sanctuary efforts, several states, enacted anti-sanctuary policies intended to quash non-cooperation policies from counties and sheriff's offices.¹⁴² And, important to this Article, states like Kansas attempted end-around *Arizona*, finding ways to criminalize unauthorized noncitizens attempting to procure employment.

Kansas v. Garcia arose out of efforts of the state of Kansas to prosecute several noncitizens for the information they entered on state tax documents as part of the employment verification process.¹⁴³ The prosecutions in the case

should be invalidated to the extent the state was using them to police areas that fall within federal immigration prerogatives. Brief for the United States as Amicus Curiae in Support of Neither Party, *supra* note 15, at 22–23. Even though the district court in *Puente Arizona* declined to adopt the DOJ's view, the federal executive maintained the same view throughout the string of cases against *Arizona* and copycat immigration enforcement laws. Through 2016, consistent with the DOJ's view of federal authority in *Plyler* and *LULAC v. Wilson*, the United States argued that even when state laws attempted to serve the same goals as federal law, IRCA and other federal laws left discretion over enforcement in the hands of federal authorities. Thus, any state laws or application of laws that tended to alter the enforcement calculus of the federal government were constitutionally invalid.

¹³⁹ After SB 1070's demise, state and local immigration law decidedly trended integrationist through President Obama's second term. By then, President Obama signature Deferred Action for Childhood Arrivals (DACA) program was in effect, and the several SB 1070 copycats had been struck down by federal courts. On the national political stage, President Obama had won reelection against Mitt Romney, a GOP candidate who endorsed state level enforcement. In that period, states and localities opened access to driver's licenses, higher education access and funding, professional licensing and other state and local benefits. See GULASEKARAM & RAMAKRISHNAN, *supra* note 4, at ch. 4–5.

¹⁴⁰ Press Release, U.S. Dep't of Just., Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [https://perma.cc/X2QV-99FU]; Ocatavio Blanco, *Sanctuary Cities Risk Billions in Defiance of Trump*, CNN (Nov. 19, 2016), <https://money.cnn.com/2016/11/19/news/economy/sanctuary-cities-trump-funding/index.html> [https://perma.cc/U32Y-PXES].

¹⁴¹ See Blanco, *supra* note 140; Kanyakrit Vongkiatkajorn, *How the Trump Administration Is Using Local Cops to Widen Its Immigration Dragnet*, MOTHER JONES (Dec. 4, 2017), <https://www.motherjones.com/politics/2017/12/how-the-trump-administration-is-using-local-cops-to-widen-its-immigration-dragnet/> [https://perma.cc/Y3Z2-JT9Y].

¹⁴² Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839–40 (2019).

¹⁴³ The underlying cases in state court involved three separate noncitizens, Ramiro Garcia, Donaldo Morales, and Guadalupe Ochoa-Lara. Mr. Garcia was initially stopped for a traffic violation. In addition to the traffic violation, however, law enforcement decided to

were based on state statutes criminalizing identity theft and identity fraud.¹⁴⁴ The noncitizen-defendants submitted fraudulent or false information on their I-9 forms, and replicated that information on state tax forms submitted simultaneously to their employers as part of the hiring process.¹⁴⁵

With *Arizona* as the controlling precedent, the noncitizens seemed poised to prevail on their preemption claim. First, IRCA declined to create criminal liability for noncitizens who work without authorization, reserving its penalties solely for employers.¹⁴⁶ Indeed, congressional committee reports in the lead up to IRCA reveal that many felt that penalties on workers themselves were superfluous, considering that the workers would always be subject to the penalty of removal.¹⁴⁷ Accordingly, the *Arizona* Court struck down SB 1070's penalty on work solicitation by unauthorized workers because federal law focused its criminal sanctions on employers and not on the noncitizens who sought employment.¹⁴⁸ Second, the *Arizona* Court rejected the "mirror" theory of state enforcement.¹⁴⁹ In doing so, it made clear that immigration preemption could not be reduced to conflicts between state statutes and the text of federal law. Instead, it measured the possibility of state policies creating obstacles to federal law as enforced, when the possibility of federal enforcement exists. IRCA creates federal criminal liability for document fraud in the work authorization process.¹⁵⁰ Even with the Trump Administration's get-tough-on-immigration rhetoric, federal prosecutions for workplace infractions were exceedingly low, and cases against individual noncitizens for fraud in the employment process

check his identity information by contacting Garcia's employer. Subsequent inquiries by federal and state officials working together revealed the use of a fraudulent or stolen social security number and identifications. Similarly, Mr. Ochoa-Lara's identity was investigated based on the identity used to secure a lease. Law enforcement officials investigated the identity on the lease, and contacted Ochoa-Lara's employer to procure his I-9 and tax withholding forms, which confirmed their suspicion that Ochoa-Lara was using a false social security number. *Kansas v. Garcia*, 140 S. Ct. 791, 799–800 (2020).

¹⁴⁴ KAN. STAT. ANN. §§ 21-6107, 21-5824 (2022).

¹⁴⁵ *Kansas*, 140 S. Ct. at 799–800.

¹⁴⁶ *Arizona v. United States*, 567 U.S. 387, 404–05 (2012); see SELECT COMM'N ON IMMIGR. & REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS at xvii, 12, 14 (1981).

¹⁴⁷ See *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. 919–20 (1972) [hereinafter *Illegal Aliens Hearings*].

¹⁴⁸ *Arizona*, 567 U.S. at 404–06. As the case notes, and legislative history confirms, federal lawmakers considered and rejected the possibility of holding the employees criminally liable. *Id.*; *Illegal Aliens Hearings*, *supra* note 147.

¹⁴⁹ See Hu, *supra* note 60, at 586–92.

¹⁵⁰ See generally 8 U.S.C. § 1324a.

were virtually non-existent.¹⁵¹ In fact, when faced with the decision whether to extend and mandate use of E-Verify, the Trump Administration declined.¹⁵²

Yet, *Kansas* differed from *Arizona* in key respects as well. First, the state used pre-existing criminal laws on identity theft and fraud that were not enacted solely for the purpose of deterring unauthorized immigration.¹⁵³ At the very least, this ruled out challenges based on “constitutional” or per se preemption theories.¹⁵⁴ Relatedly, the relevant Kansas laws did not trade on immigration status, thus undermining facial challenges to their validity.¹⁵⁵

In addition, the federal Executive Branch’s position had shifted diametrically. In contrast to *Arizona* in which the federal DOJ sued the state, the DOJ’s intervention in *Kansas* clarified that the federal government supported the state’s application of its criminal laws.¹⁵⁶ Leading up the state prosecutions, federal authorities—now under President Trump’s DHS and DOJ—provided information and support to Kansas officials as they investigated, apprehended, and prosecuted the noncitizens in question.¹⁵⁷ To be sure, past administrations also had worked with state authorities on a voluntary and individualized basis to apprehend noncitizens, and share information relevant to prosecutions and arrests.¹⁵⁸ But the federal administration took a further step with *Kansas*. In the

¹⁵¹ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, FEW PROSECUTED FOR ILLEGAL EMPLOYMENT OF IMMIGRANTS (May 2019), <https://trac.syr.edu/immigration/reports/559/> [<https://perma.cc/54B5-ABN2>] (tracking federal prosecutions under IRCA provision 8 U.S.C. § 1324a, and showing that only eleven individuals (and no companies) who worked in seven companies were prosecuted from Apr. 2018–Mar. 2019, and noting that, dating back to 1986, prosecutions rarely climb over fifteen per year, and only once exceeded twenty); Renae Merle, *As Workplace Raids Multiply, Trump Administration Charges Few Companies*, WASH. POST (Aug. 9, 2019), <https://www.washingtonpost.com/business/2019/08/09/workplace-raids-multiply-trump-administration-charges-few-companies/> [<https://perma.cc/NHV7-TAAZ>].

¹⁵² Stephen Dinan, *Donald Trump’s Retreat on E-Verify Called ‘Takeover’ of Immigration Agenda*, WASH. TIMES (Feb. 12, 2020), <https://www.washingtontimes.com/news/2020/feb/12/trump-retreat-e-verify-called-takeover-immigration/> [<https://perma.cc/5499-QLPT>] (noting that Trump’s budget signaled a retreat on campaign promise to mandate E-Verify use for all businesses).

¹⁵³ See KAN. STAT. ANN. §§ 21-6107, 21-5824 (2022).

¹⁵⁴ As noted in Part II.B, SB 1070’s avowedly immigration-control purpose in its section 1 might have provided the basis for per se preemption of the state law.

¹⁵⁵ This difference certainly supported the conclusion that the laws were not facially invalid. But, contesting the state laws’ general applicability was never really a serious question.

¹⁵⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834); see Brownell, *supra* note 110.

¹⁵⁷ *Kansas*, 140 S. Ct. at 806–07.

¹⁵⁸ See, e.g., Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 351–55 (2018) (“To boost the number of removals, the Obama administration revamped a pre-existing program known as ‘Secure

course of that litigation, the DOJ shifted from its prior view, expressed during *Arizona* and as recently as 2016,¹⁵⁹ and instead clarified that the federal Executive Branch supported the ability of states to enforce state laws against noncitizens in the employment process.¹⁶⁰

As a doctrinal matter, this change in legal perspective introduced a new wrinkle to questions of executive discretion in preemption analysis. Instead of trying to curtail independent state enforcement as it did in *Arizona*, the Executive's legal position in *Kansas* supported it.¹⁶¹ The Executive's endorsement fed directly into Justice Alito's critique in his *Arizona* dissent, in which he rhetorically asked whether a changed executive policy would change the preemption result in that case.¹⁶²

With Justice Alito writing for the majority in *Kansas* then, it was no surprise that the Court upheld the state's actions. First, the Court unanimously held that IRCA did not expressly preempt Kansas's application of state laws.¹⁶³ As with

Communities,' which placed noncitizens who had brushes with state and local criminal justice systems in the federal removal pipeline.'").

¹⁵⁹ See Brief for the United States as Amicus Curiae in Support of Neither Party, *supra* note 138, at 13. In a case concerning whether Arizona's application of employment-related identity theft laws was preempted by federal law, the DOJ argued "the Court should hold those provisions preempted to the extent they rely for their enforcement on information in or accompanying the federal Form I-9, or penalize fraud committed to demonstrate authorization to work in the United States under federal immigration law." *Id.* at 1.

¹⁶⁰ Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 156, at 21–32. The DOJ's brief argued that the state supreme court had erred in finding express preemption. In addition, it argued that Kansas's prosecutions were not field or obstacle preempted. As part of its implied preemption argument, the DOJ noted the federal government's support of, and aid with, state prosecutions. *Id.*

Some justices took note that the DOJ's position seemed to contradict the federal government's view in similar federal cases from just a few years prior. Justice Breyer's questions in oral argument on the case, and later his dissenting opinion, both took the government to task for this equivocation. *Kansas*, 140 S.Ct. at 808–09 (Breyer, J., concurring in part and dissenting in part). Highlighting this shift seemed to be about more than just a "gotcha" moment. The deeper concern was that the DOJ's shift in position ceded control over aspects of immigration regulation that federal executive officials had jealously guarded against throughout the modern era of immigration enforcement.

¹⁶¹ Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 156, at 11–13.

¹⁶² *Arizona v. United States*, 567 U.S. 387, 445 (2012) (Alito, J., concurring in part and dissenting in part) ("If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?").

¹⁶³ *Kansas*, 140 S. Ct. at 802–04. This was an unsurprising, but not inevitable result. IRCA includes an express preemption provision (the same provision that superseded California's 1970s employer sanction law) that limits the use of the I-9 form and process to either enforcement of IRCA itself (which is left to federal authorities), or to specified federal crimes for fraud, false statements, misuse of visas, and perjury. 8 U.S.C. § 1324a(h)(2). In other words, IRCA imagines that the federal enforcement authorities will deal the fraud in

most preemption cases, however, the real dispute arose over implied preemption.¹⁶⁴ Rejecting the implied preemption claim, a five justice majority found no evidence that federal law intended to displace state laws that might also police fraud in the employment process, even when that fraud is related to an unauthorized noncitizen's attempt to evade IRCA's requirements.¹⁶⁵ The opinion relies on *Whiting* to clarify that the Court would not be engaged in a "freewheeling judicial inquiry" into tensions with inchoate "federal objectives."¹⁶⁶ Without saying so explicitly, the approach signaled approval of a "presumption against preemption" and clear statement rules for preemption.¹⁶⁷

Starting from these signposts, the opinion keyed on a formalistic comparison of federal law and state enforcement. As per the Court, although IRCA limits use of information entered on the I-9, by the end of trial the state was not relying on the I-9 as the basis for prosecution.¹⁶⁸ Instead, the state used the same identity information entered on the state tax withholding forms.¹⁶⁹ Tax withholding forms serve the purpose of verifying tax liability, not employment authorization, the Court reasoned.¹⁷⁰ Alito then posited that use of the identity information on the state tax form—which was submitted for the same purpose and as part of the same employment-procurement process as the I-9—was fundamentally "different" than prosecutions based on the I-9 itself.¹⁷¹ Having concluded that these forms served different purposes, Alito reasoned that IRCA's concern with work authorization was irrelevant to the state's tax

the I-9 form and process. But Kansas's prosecutions were based, at least formally, on state tax forms. So, while IRCA did not explicitly authorize state involvement in policing unauthorized work, its express preemption provision did not preclude with particularity the possibility of state prosecutions in the employment verification process.

¹⁶⁴ Notably, Justices Thomas and Gorsuch argued that the Court should abandon implied preemption inquiry altogether, permitting state regulation in all instances in which Congress failed to expressly preempt. *Kansas*, 140 S. Ct. at 807 (Thomas, J., concurring). Nevertheless, they also joined Justice Alito's five justice majority opinion disposing of the implied preemption claim. *Id.* at 796 (majority opinion).

¹⁶⁵ *Kansas*, 140 S. Ct. at 806–07 ("In the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests.").

¹⁶⁶ *Id.* at 801.

¹⁶⁷ See, e.g., Young, *Ordinary Diet of the Law*, *supra* note 20, at 307 n.290 (noting that scholars have chronicled federal courts' failure to consistently apply the presumption against preemption).

¹⁶⁸ The state initially filed charges based on the I-9 itself. After motion from defendants, the state withdrew the charges based on the I-9 and charged based on the same information entered on the tax forms. Brief for Respondents at 8, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834).

¹⁶⁹ *Kansas*, 140 S. Ct. at 800 ("The State entered K-4's and W-4's into evidence against Garcia and Morales, and Ochoa-Lara stipulated to using a stolen Social Security number on a W-4.").

¹⁷⁰ *Id.* at 804 ("[C]ompleting tax-withholding documents plays no part in the process of determining whether a person is authorized to work.").

¹⁷¹ *Id.* at 804–05.

liability concerns.¹⁷² This thin distinction, focusing on the technical utility of each form, rather than the defendants' reasons for using a false identity in the employment process, bore the weight of his reasoning.¹⁷³

In light of *Kansas* then, whither *Arizona*, decided only eight years prior? The majority opinion declines to expressly overrule *Arizona*, and it is possible to narrowly read *Kansas*.¹⁷⁴ While these are plausible readings that lower courts might be well-advised to adopt, it appears clear that the *Kansas* majority aspired to reach broader. Conspicuously, Justice Alito begins his opinion by skipping over *Arizona*, and reaching back to *Whiting* (an express preemption case) and *De Canas* (decided prior to IRCA's enactment, and the creation of a federal enforcement system for unauthorized employment).¹⁷⁵ Conjuring those more dated cases rather than the Court's most recent and complete evaluation of implied preemption in immigration federalism, signaled his intent to overrule *Arizona* sub silentio. That rhetorical gambit paid off in the concluding paragraphs of the majority opinion.

First, Alito declined to differentiate immigration enforcement from other federal-state relationships. He viewed enforcement against noncitizens in the work authorization process as indistinguishable from any other criminal concern:

The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today. . . . Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.¹⁷⁶

¹⁷² *Id.* at 804. I reserve discussion of the connection between the defendant's conduct and federal immigration enforcement for Part III.C, below.

¹⁷³ Notably, the DOJ had rejected precisely this argument just a few years prior in litigation over the application of Arizona's identity fraud laws. See Brief for the United States as Amicus Curiae in Support of Neither Party, *supra* note 15, at 11–15.

¹⁷⁴ For example, the holding might be understood to apply only when the elements of state criminal laws, operating independently of immigration status, can be established without relying on documents related to immigration enforcement, and where federal law does not specifically forbid state regulation. Or, alternatively, a lower court might understand *Kansas* to mean that when the federal government criminalize noncitizens' conduct that can and declines to prohibit concurrent state enforcement, states may also criminalize that same conduct. Justice Alito, for example, emphasized that federal law makes it a crime to enter fraudulent information on a federal tax form. *Kansas*, 140 S. Ct. at 803, 806. Even under these narrower readings, the threat of selective prosecution and other discriminatory enforcement against noncitizens would still have to be monitored.

¹⁷⁵ *Id.* at 797.

¹⁷⁶ *Id.* at 806.

He then struck at the heart of *Arizona*'s preemption approach, jettisoning the idea of relying on federal enforcement practice or pronouncements:

In the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests. Federal authorities played a role in all three cases, and the Federal Government fully supports Kansas's position in this Court. In the end, however, the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to "the Laws of the United States," not the criminal law enforcement priorities or preferences of federal officers.¹⁷⁷

These concluding salvos likely preclude a narrow application that might co-exist with *Arizona*.¹⁷⁸ Instead, Justice Alito's opinion seems designed to normalize the presence of states in immigration enforcement matters, regardless of Executive Branch practices or prerogatives. In this way, *Kansas* serves as a repudiation of *Arizona*'s animating principle, and sidelines the centrality of executive enforcement practices in helping to define federal law and provide limits to state involvement.¹⁷⁹

It remains to be seen whether, as a practical matter, *Kansas* will significantly alter the lives of noncitizens even though it altered the legal framework. Many restrictionist state and local policies are symbolic and ideological lightning rods, without much effect. Zealous officials might vigorously pursue and defend state and local enforcement policies with much fanfare, but let them vanish into desuetude afterwards when the cost of maintaining the policy and competing priorities of local governance draw attention away.¹⁸⁰ Further, robust

¹⁷⁷ *Id.* at 806–07.

¹⁷⁸ *Cf.* Brief for Amici Curiae of Immigration, Labor and Employment Law Scholars in Support of Respondents at 2–3, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834) ("[T]o adopt the State's ephemeral distinction would as a practical matter vitiate the Court's holding in *Arizona*.").

¹⁷⁹ It is worth noting that while this Article focuses on immigration federalism consequences, *Kansas* might be the harbinger of a broader shift in preemption analysis with effects felt in every regulatory area. Justice Thomas, joined by Justice Gorsuch, joined the majority opinion in full. Thomas also wrote (and Gorsuch joined) a concurring opinion in which he advocated abandoning the "purposes and objectives" inquiry that forms the basis of implied preemption analysis and expressed deep skepticism of field preemption. *Kansas*, 140 S. Ct. at 807–08 (Thomas, J. concurring). Overall, his opinion is fairly read as one that would only permit federal preemption in express preemption cases. Since the time of his concurrence, Justice Barrett has joined the Court, but has of yet has not made her views on preemption doctrine known. If the Court were to slide towards the Thomas/Gorsuch view, the regulatory landscape in several different fields would likely be changed significantly.

¹⁸⁰ *See, e.g.*, Caitlin Byrd, *Charleston Sheriff Cuts Ties with ICE, Calls Policy 'Legal Racial Profiling'*, STATE, <https://amp.thestate.com/news/charleston/article248281210.html> [<https://perma.cc/HR9K-J5N6>] (Jan. 5, 2021); WESLEY THARPE, GA. BUDGET & POL'Y INST., VOLUNTARY IMMIGRATION ENFORCEMENT A COSTLY CHOICE FOR GEORGIA COMMUNITIES 1 (2018); Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y.

enforcement is likely only to occur in “red” states with low immigrant populations and officials ideologically committed to maximum enforcement.¹⁸¹ Even within Kansas, the prosecutions in the case all stemmed from one county, brought by the same district attorney, as did prior identity theft prosecutions of noncitizens.¹⁸² Moreover, only noncitizens who steal or create false identities to secure employment would be subject to state enforcement, leaving alone the millions of undocumented workers who work without any fraudulent documentation.

Alternatively, it is also possible that *Kansas* might have opened a new front for restrictionist policies, allowing interested state prosecutors to supplement and enhance workplace enforcement through application of identity fraud laws. For example, twelve states joined an amicus filing urging the Supreme Court to rule in favor of Kansas.¹⁸³ Prior to and contemporaneous with Kansas’s prosecutions, courts had been considering similar prosecutions in other states, with mixed judicial outcomes.¹⁸⁴ Thus, if there is widespread, pent-up desire for workplace enforcement, *Kansas* opens the door to states being able to satiate that demand.

It may be some time before we can assess if *Kansas* will produce practical enforcement changes for noncitizens. Regardless, even in our present moment, we can say that *Kansas* is an outlier. It portends a doctrinal landscape for enforcement federalism far different from *Arizona* and the immigration federalism cases preceding it.

TIMES (Sept. 26, 2007), <https://www.nytimes.com/2007/09/26/nyregion/26riverside.html> [<https://perma.cc/3NZ8-TSZ2>].

¹⁸¹ See generally GULASEKARAM & RAMAKRISHAN, *supra* note 4, at 82–86.

¹⁸² The cases were all heard in Johnson County, Kansas, a large suburban county outside of Kansas City, Missouri. Roxana Hegeman, *Kansas Supreme Court Upholds 2 Identity Theft Convictions*, U.S. NEWS & WORLD REP. (June 12, 2020), <https://www.usnews.com/news/best-states/kansas/articles/2020-06-12/kansas-supreme-court-upholds-2-identity-theft-convictions?context=amp> [<https://perma.cc/F3ST-JP6P>] (noting the Johnson County DA’s robust prosecution of identity theft crimes against noncitizens).

¹⁸³ See generally Brief of Indiana and Eleven Other States as Amici Curiae in Support of Petitioner at 1, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834) (Brief for Indiana, Alabama, Alaska, Georgia, Maine, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia).

¹⁸⁴ See, e.g., *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1110 (9th Cir. 2016) (holding that state’s identify theft laws were not facially preempted by IRCA); *State v. Martinez*, 896 N.W.2d 737, 754–55 (Iowa 2017) (ruling that state forgery law penalizing use of document to show authorized stay or work authorization, and state identify theft statute as applied to noncitizen attempting to procure employment were impliedly preempted by IRCA); *State v. Reynua*, 807 N.W.2d 473, 480 (Minn. Ct. App. 2011) (finding application of state forgery law to information entered on I-9 to be preempted by IRCA).

III. RETURNING TO ARIZONA: PRESIDENTIAL ENFORCEMENT PRACTICE AS FEDERAL IMMIGRATION POLICY

Shifting to prescriptive claims, Part III below argues that the *Kansas* majority mistakenly discounted executive enforcement practice in preemption analysis. Immigration enforcement federalism necessitates a framework that eschews rigid notions of federal law that might be apropos for preemption in other regulatory areas. Under the current conditions of immigration policy, federal enforcement as exercised and practiced by the federal Executive Branch more accurately reflects immigration law as practiced and experienced. Thus, enforcement practices should inform the question whether state policies create obstacles to federal law. The actual execution of immigration law illuminates how the federal government chooses to use its vast discretion in the immigration enforcement field and helps provide a meaningful distillation of the capacious and contradictory dictates in the text of the immigration code.

Part A explains why immigration preemption requires accounting for executive enforcement practices.¹⁸⁵ Part B then differentiates executive enforcement practices from the macro-level pronouncements of any singular executive. Part C offers preliminary thoughts on how this approach might have informed the Court's reasoning in *Kansas*. I am not the only commentator to defend some version of including executive practice in immigration preemption. Most prominently, Hiroshi Motomura, in *Immigration Outside the Law*, urged that courts account for "law in action" as part of their calculus in enforcement federalism cases.¹⁸⁶ Here, I provide a more fulsome defense of the idea, in light of the Trump Administration's about-face on state enforcement and *Kansas*'s jettisoning of executive practice altogether.

A. Executive Enforcement Practice in Immigration Federalism

Kansas treats immigration enforcement as it might other regulatory areas that are more closely aligned with, if not completely defined by, statutory text or regulatory enactments. Immigration enforcement, however, is not like other regulatory areas for two reasons. First, at least as currently conceived, statutory text bears little relationship to immigration enforcement as executed or experienced.¹⁸⁷ This is partly a function of the expansiveness of the immigration code, from which it remains impossible to discern singular or meaningful congressional purposes for purposes of preemption analysis. Executive Branch

¹⁸⁵ Cox, *supra* note 5, at 32–33 (arguing that *Arizona* conceptualizes immigration law as a "price" rather than an "obligation").

¹⁸⁶ MOTOMURA, *supra* note 21, at 121–24 (arguing that "selective enforcement" patterns may form the basis of preemption).

¹⁸⁷ *Id.* at 121 ("In theory, immigration law starts with Congress, but in practice it is made in the field.").

enforcement helps distill discernable federal policy from a jumbled and conflicting code, in ways that reflect the actual effect of immigration law. Second, the nature of unauthorized status and its consequences are unique to immigration law. The status itself operates as a perpetual penalty, restricting the ability of noncitizens to participate fully in civic life. The fact of unauthorized status permits the federal Executive Branch, in its discretion, to charge the noncitizen criminally under federal law, to initiate removal proceedings, to do both, or to do neither.¹⁸⁸ Permitting states independently to enter that enforcement space limits federal discretion, obscures enforcement choices, and deteriorates accountability in the immigration system.

For citizens and noncitizens alike, immigration enforcement has relatively little to do with the literal prohibitions of the immigration code, or even formal rules promulgated by DHS.¹⁸⁹ On-the-ground demographics bear out this claim. Immigration laws render approximately eleven million people unlawfully present in the country.¹⁹⁰ That number represents over three percent of the national population, and more acutely, over forty percent of the noncitizen population.¹⁹¹ In effect, nearly half of those currently subject to the immigration code run afoul of its provisions and could be subject to removal. Over the past few decades, amendments to the immigration code have rendered broader classes of noncitizens unlawfully present.¹⁹² While many of these measures were designed to disincentivize unlawful migration and unlawful presence, in

¹⁸⁸ See David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 200–04 (2012) (identifying and critiquing an enforcement regime in which federal authorities can make strategic choices between modes of enforcement and punishment).

¹⁸⁹ MOTOMURA, *supra* note 21, at 124 (“The operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions.”); see also COX & RODRÍGUEZ, *supra* note 7, at 3 (“[T]he logic and tools of enforcement define contemporary immigration policy. This dynamic, in turn, empowers the President and executive officials to shape the meaning of immigration law according to their own values and policy preferences.”); Kim, *supra* note 6, at 692 (“[T]he great bulk of contemporary immigration policymaking stems not from Congress, but rather from executive branch agencies and states.”).

¹⁹⁰ BRYAN BAKER, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 1 (2021).

¹⁹¹ See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/RP47-UKZ2>] (breaking down 44.8 million foreign-born population in 2017, and estimating 20.7 million naturalized citizens, 12.3 million lawful permanent residents, 10.5 million unauthorized immigrants, and 2.2 million nonimmigrants).

¹⁹² For example, over the past thirty years, the “aggravated felony” definition in the INA expanded from a few crimes in one provision to two dozen crimes spanning subsections (A) through (U) of 8 U.S.C. § 1101(a)(43).

the main they have increased the unauthorized population, rather than deter or shrink it.¹⁹³

Congress, having legislated to expand the violations that render one unlawfully present, has never reconciled its ever-expanding prohibitions with the plausibility or desirability of enforcement. As a result, even at the historical peak of removals under the Obama Administration, less than five percent of the unlawfully present population faced removal through interior enforcement in a given year.¹⁹⁴ Multiple opportunities for prosecutorial or judicial discretion permeate federal law. In addition, federal workplace monitoring is non-systemic, primarily delegated to private employers, and depends on spot-check audits or isolated high-profile raids.¹⁹⁵ In combination, these ingrained aspects of immigration enforcement make clear that complete, unyielding fidelity to statutory prohibition is neither the design nor desired outcome of federal immigration law.¹⁹⁶

Instead, in most instances, the immigration “laws” we argue about are the interpretations of statute and discretionary policy decisions of the Executive Branch, outside of both congressional statutes or even formally enacted agency regulations.¹⁹⁷ When presidential candidates articulate their positions on immigration, it matters more than their policy preferences in other areas that more faithfully may be constrained by statutory boundaries.¹⁹⁸ What matters in

¹⁹³ See 8 U.S.C. § 1182(a)(9)(B)(i)(I), (II). The provisions were initially designed by Congress to incentivize noncitizens to depart prior to accruing 180 days of unlawful presence; they have had the opposite effect. See, e.g., Alex Nowrasteh, *Removing the 3/10 Year Bars Is Not Amnesty*, CATO INST. (Apr. 23, 2014), <https://www.cato.org/blog/removing-310-year-bars-not-amnesty> [<https://perma.cc/JV3L-93N6>] (“One reason why the number of unauthorized immigrants has increased so much in recent decades is that the 3/10 year bars raise the cost of returning to their home countries.”).

¹⁹⁴ See Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enf’t to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) (stating that ICE only had resources to remove approximately 400,000 noncitizens per year).

¹⁹⁵ See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 846 n.133 (2007).

¹⁹⁶ *Id.* at 813 (arguing that the U.S. immigration system predominantly is an “ex post” system that “results from deliberate underenforcement of immigration law plus periodic amnesties”).

¹⁹⁷ See *id.* For example, decisions to forbear from prosecution either on an individual or large-group basis (like DACA), worksite raids, liberalizing or tightening of enforcement priorities, exercising discretion in removal cases, increasing border vigilance or building a border wall, and similar actions all are within Executive Branch decision-making authority. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2393, 2400 (2018) (upholding presidential determination to ban immigration from several countries).

¹⁹⁸ For example, the provisions of the INA require an allocation of visas to nearly every country. See 8 U.S.C. § 1153. Yet, through express delegation (also in the INA), a President was able to ban the entry of noncitizens from several countries. *Trump*, 138 S. Ct. at 2400. Formal law allows every migrant at the southern border to seek humanitarian protection, yet

immigration law is whom the Executive chooses to apply the law to, and under what circumstances, given labor needs, humanitarian concerns, resource constraints, and public policy preferences.

Formal law, of course, remains relevant. Legislative text is still the starting point in defining federal interest and scope of federal concern.¹⁹⁹ Many judicial opinions and briefs, however, hold fast to the implausible narrative that the INA has “carefully calibrated” competing concerns or has “carefully balanced” various interests.²⁰⁰ This description might fit a single provision of the INA enacted at a particular moment in time. As applied to the entirety of the mammoth code, however, it is at best a convenient fiction, useful mostly as a rhetorical penumbra to frame advocates’ briefs.

In truth, the INA is a gargantuan and complex statute, amended several times over the past seven decades, with many provisions tacked on without a full accounting of how they interact with the prior code.²⁰¹ As a result, judicial inquiry into any singular preemptive intent of the INA is a difficult, if not

executive enforcement guidance defined how many could seek that protection, and under what circumstances. *Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/XE8B-9WGP>].

¹⁹⁹ It is possible to construct an argument for the noncitizen-defendants in *Kansas* relying on interpretation of the federal immigration statute itself. *See, e.g.*, Brief for Amici Curiae of Immigration, Labor and Employment Law Scholars in Support of Respondents, *supra* note 178, at 5–11. There, the authors argued that IRCA’s statutory scheme, read holistically, reserves to the federal government both the individualized decision to prosecute any instance of seeking unauthorized employment through fraud, as well as the discretion not to pursue such prosecution in any given circumstance. *Id.* at 11.

²⁰⁰ *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 400, 403 (describing federal immigration law as having “struck a careful balance,” and noting that allowing states to impose their own penalties for federal offenses would conflict with the “careful framework Congress adopted”); Brief for Amici Curiae of Immigration, Labor and Employment Law Scholars in Support of Respondents, *supra* note 178, at 11 (describing IRCA as “carefully structured to ensure that only the federal government may prosecute individuals for false documentation” in the employment verification process (emphasis added)); Peter Margulies, *The New Travel Ban: Undermining the Immigration and Nationality Act*, LAWFARE (Sept. 25, 2017), <https://www.lawfareblog.com/new-travel-ban-undermining-immigration-and-nationality-act> [<https://perma.cc/9ZV5-WJ6F>] (describing the INA’s visa processing scheme as “carefully calibrated”).

²⁰¹ Originally enacted in 1952, the INA as we know it today was significantly revised in 1965, and its present form is the result of subsequent major amendments and revisions in 1976, 1980, 1986, 1988, 1990, 1996, 2001, and 2005, not to mention several other minor changes in other years. *See generally* MIGRATION POL’Y INST., MAJOR U.S. IMMIGRATION LAWS, 1790-PRESENT (Mar. 2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIR-1790Timeline.pdf> [<https://perma.cc/T6T2-W2W4>].

incoherent, task if the only source for divining intent is the text of the statute.²⁰² At best, it may be possible to discern multiple legislative purposes, some complementary to each other, others orthogonal, and some contradictory. These accreted provisions render millions without status, and prohibit unauthorized employment and identity fraud in procuring that employment.²⁰³ Yet, at the same time, that very same code includes dozens of relief provisions allowing enforcement agents, immigration prosecutors in DHS, and immigration judges in DOJ the discretion to mitigate removal consequences, and grant lawful status.²⁰⁴ And, some provisions delegate to the Executive department the authority to override central components of admissions and removal policy.²⁰⁵ Overlaying this scheme, all of the enforcement provisions—related to both prohibitions and to opportunities for relief—may only be enforced to the extent accomplishable with annual appropriations by Congress.²⁰⁶ Compared to the size of the unauthorized population created by the text of federal law, the amount of appropriated funds and institutional structures provided by Congress cannot possibly address that entire population.

Rather than imagining holistic and harmonious legislative calibration, courts might instead understand executive enforcement practices as a more faithful distillation of the competing values and purposes embedded in the massive immigration code. This persistent gap between formal law and its effect informs Adam Cox’s insightful explanation of why the *Arizona* Court chose to reject the norm of enforcement redundancy between federal and state authorities.²⁰⁷ According to Cox, the *Arizona* majority preempted provisions of SB 1070 because it conceptualized immigration law as a “set of prices rather than a series of obligations.”²⁰⁸ Understood as obligation, immigration law is the formal law expressed in the code. When formal rules fail to generate

²⁰² COX & RODRÍGUEZ, *supra* note 7, at 129 (describing the INA as a “sixty-year accumulation of divergent preferences and often contradictory political compromises,” enacted to respond to different pressures and political exigencies).

²⁰³ See 8 U.S.C. §§ 1225(c), 1182(a)(6)(C).

²⁰⁴ See, e.g., 8 U.S.C. §§ 1182(d), (h), (i), (k), 1227(c), 1229b, 1229c.

²⁰⁵ See 8 U.S.C. § 1182(f) (permitting the President to “suspend the entry of all aliens” determined by him to “be detrimental to the interests of the United States”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (“By its terms, § 1182(f) exudes deference to the President in every clause. . . . It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with ‘ample power’ to impose entry restrictions in addition to elsewhere enumerated in the INA.”); Kim, *supra* note 6, at 714 (“Unlike other areas of administrative law, however, the INA also expressly awards immigration agencies discretionary authority to override many of its central mandates.”).

²⁰⁶ See AM. IMMIGR. COUNCIL, AN OVERVIEW OF THE GOVERNMENT FUNDING PROCESS (APPROPRIATIONS) 6 (Dec. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_the_government_funding_process_appropriations_1.pdf [<https://perma.cc/8U89-VTR2>].

²⁰⁷ Cox, *supra* note 5, at 48–62.

²⁰⁸ *Id.* at 32.

compliance, however, they become less important relative to enforcement practice. In such instances, federal law might be better understood as a set of prices. Understood as a price, what matters is the expected sanction for conduct that violates the formal law.²⁰⁹ The expected sanction, in turn, depends on the likelihood of enforcement given the priorities and decisions of the Executive branch. According to Cox, the centrality and importance of the Executive's role in immigration justifies measuring immigration law by its expected sanction.²¹⁰

In addition to the gap between formal law and its execution, the unique disabilities associated with irregular immigration statuses counsel in favor of including federal enforcement practices in preemption decisions. Noncitizens without lawful status experience the sanctions of immigration law regardless whether an ultimate sanction—in the form of state criminal liability or removal by federal authorities—additionally will apply.²¹¹ Without lawful status, a noncitizen—regardless whether they are discovered or apprehended—automatically is barred from a number of federal, state, and local rights, benefits, and resources without further enforcement action by federal or state authorities.²¹² And, at all times, their residency and participation in economic and civic life is contingent and tenuous. If they are caught, their unlawful status can be used as the basis of federal prosecution and removal at any time, regardless of time passage since the initial unlawful entry, visa overstay, or other status violation.²¹³ In essence, federal law imposes ever-present, everlasting consequences, creating a “floor” for immigration penalties, regardless of additional federal criminal or removal prosecutions.

In most other areas, the legal liabilities and exclusions are not ever-present, and do not permeate and perpetually limit individuals from participation in economic, civil, and social life. In many instances, individuals and entities must be caught violating the law in order for consequences to attach. For example, generally a person cannot be prosecuted for once having possessed a controlled substance; a traffic violator has to be apprehended while speeding in order to be held to account; a company that violates environmental laws can continue to operate as usual unless and until their violations are discovered. In other words, while their misdeeds may subject them to liability at some point, as long as they are not discovered, their violations do not brand them or relegate them to a status that impedes their enjoyment of other benefits. In addition, statutes of

²⁰⁹ *Id.* at 32–33.

²¹⁰ *See id.* at 55–57.

²¹¹ *See* TANYA BRODER, GABRIELLE LESSARD & AVIDEH MOUSSAVIAN, NAT'L IMMIGR. L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 4–5 (Oct. 2022), <https://www.nilc.org/wp-content/uploads/2022/10/overview-immeligfedprograms-2022-10.pdf> [<https://perma.cc/3AD9-GDV8>].

²¹² *See, e.g.*, Social Security Act, 42 U.S.C. § 402(n).

²¹³ *See* 8 U.S.C. § 1182(a)(6)(A)(i), 1182(a)(7)(A)(i).

limitations operate to mitigate or eliminate the penalty of transgressions discovered or prosecuted too late.²¹⁴

The choice of enforcement possibilities—between federal criminal liability or the perpetual threat of removal in ways that implicate fundamental liberty and equality interests—*only exists in immigration enforcement*.²¹⁵ The INA permits the federal executive to make choices between enforcement modes, or to decline to enforce either, allowing the exclusions inherent to unauthorized status to operate as the penalty. Indeed, in *Kansas*, federal authorities apparently were forbearing from immigration and criminal prosecution against one defendant because he was cooperating with those authorities in their investigation of an employer engaged in workplace infractions.²¹⁶ Once states prosecute that noncitizen for the same conduct that federal authorities could have prosecuted (but chose not to), the state has effectively constrained federal enforcement choices, and altered the expected sanction of immigration-related violations. The federal government's leverage over the noncitizen, and the incentives for the noncitizens to cooperate, have been diminished. Looking to future cases, unauthorized noncitizens would have little incentive to accept federal agreements over enforcement if they cannot be assured that state authorities will also forbear.

The choice of enforcement modes for the federal government, or to allow unauthorized noncitizens to exist in legal limbo, also explains why it is problematic to allow states independently to compensate for immigration enforcement areas they believe are underenforced. One might argue that executive enforcement preemption yields the seemingly odd result that state policy is more likely to be preempted when the federal government is lax in enforcement, yet will be saved from preemption when the federal government is robustly enforcing. This result is not odd, however, if we conceive of federal enforcement as liquidating the meaning of federal policy by incorporating the competing values and possibilities in the INA, including resource constraints on enforcement. So understood, freeing states independently to prosecute

²¹⁴ See, e.g., CAL. PENAL CODE § 801 (West 2011) (statute of limitations for a crime punishable by confinement in the state prison is three years).

²¹⁵ See MOTOMURA, *supra* note 21, at 141 (“[E]nforcement discretion is unusually important in immigration law, where detection and enforcement lead to a very severe penalty—removal from the United States—and the low rates of the investigation, detection, apprehension, and prosecution are essential to the system itself.”); Sklanksy, *supra* note 188, at 218 (“Not everyone is vulnerable to the use of immigration procedures as a parallel system of crime control, and not everyone is subject to prosecution for criminal violations related to immigration: only noncitizens.”).

²¹⁶ Hegeman, *supra* note 182 (“[Garcia’s] attorneys told the court that the federal government didn’t charge Garcia because he was cooperating with an investigation into a previous employer suspected of directing employees to change Social Security numbers. The local district attorney nonetheless charged him with identity theft, and pursued the state case even after Garcia obtained lawful immigration status.”).

noncitizens for immigration-related violations increases the opacity and decreases the accountability of, a federal enforcement system that, in Professor David Sklansky's assessment, already suffers from an "accountability deficit."²¹⁷ By comparison, in other regulatory areas, state authority is plenary, and federal authorities generally do not maintain the same degree of choice between civil and criminal enforcement modes with significantly different charges, processes, and consequences.²¹⁸

Indeed, Justice Alito recognizes the ever-present liability of unauthorized status,²¹⁹ but ignores its profound implications for preemption. His opinion imagines that exempting noncitizens from as-applied criminal liability under state identity theft laws gifts noncitizens who cheat the employment verification process a free pass that citizens do not receive.²²⁰ That characterization, however, makes sense only when state law liability is considered in a vacuum, disconnected from the inherent consequences of unauthorized status and the looming possibility of federal criminal prosecution or removal. Assessed in light of those persistent threats, however, it becomes evident that noncitizens gain no special treatment.

Like citizens and other authorized workers, unauthorized noncitizens clearly may be prosecuted under state identity theft laws when their conduct is unrelated to employment verification of other immigration-related concerns.²²¹ Even had the noncitizens prevailed in *Kansas*, the state would have still been able to prosecute the noncitizen-defendants under those same state laws, if the noncitizens had used false or stolen identities to procure loans, apply for credit cards, receive public benefits, or other ends left unregulated by federal immigration law.²²² Within the employment verification context, immigration preemption might—under limited as-applied circumstances—exempt the noncitizen from state criminal liability; it would not—because it cannot—save

²¹⁷ Sklansky, *supra* note 188, at 217.

²¹⁸ *Cf. id.* at 201 ("Crimmigration . . . is a particularly good example of ad hoc instrumentalism at work"). To be clear, other regulatory areas provide for "overlapping" jurisdiction and different enforcement modes. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 201–02. Immigration law, however, allows for strategic targeting of noncitizens, who may be investigated for criminal violations, but removed on unrelated status violations. See Sklansky, *supra* note 188, at 218–19.

²¹⁹ *Kansas v. Garcia*, 140 S. Ct. 791, 798 (2020) ("Federal law does not make it a crime for an alien to work without authorization, and this Court has held that state laws criminalizing such conduct are preempted. . . . But if an alien works illegally, the alien's immigration status may be adversely affected." (citation omitted)).

²²⁰ *See id.* at 802–05.

²²¹ *See id.* at 798; Press Release, U.S. Dept. of Just., U.S. Att'y's Off., N.D. Iowa, *Illegal Alien Sentenced to Prison for Using Another Person's Social Security Number* (Mar. 27, 2019), <https://www.justice.gov/usao-ndia/pr/illegal-alien-sentenced-prison-using-another-person-s-social-security-number> [<https://perma.cc/43QX-7H7K>].

²²² *Kansas*, 140 S. Ct. at 798.

the unauthorized noncitizen from federal criminal liability under IRCA or from removal prosecution.

* * *

Kansas's core flaw then is that it turns a blind eye to the diminishing relevance of formal law in immigration enforcement, and ignores the persistent penalties and exclusions associated with unauthorized status. By fiat, the majority opinion attempts to re-establish the primacy of formal law in public and legal understanding of immigration policy.

B. Presidential Statements and Preemption

The more difficult question raised by *Kansas* is not whether executive enforcement decisions should matter in immigration preemption decisions, but rather what to do when the federal executive articulates a maximal enforcement plan, encourages subfederal participation, discourages “sanctuary”-types of policies, and supports the imposition of state authority in ways that impact noncitizens. Here, this Article argues that an executive’s articulated support of state prosecutions should be understood as one, non-dispositive input in determining executive enforcement practice. On this point, this Article parts ways with assessments of *Arizona* that have focused on the mechanics and virtues of specific guidance memorandum and public statements.²²³

Recent work by Professors Cox and Rodríguez appears to assume that institutional incentives generally lead to presidents maintaining control over state and local participation, even as executive agencies rely upon some forms of subfederal cooperation to achieve their enforcement goals.²²⁴ Three different examples—Section 287(g) agreements, the Secure Communities Program,²²⁵

²²³ For example, Catherine Kim’s functionalist approach to preemption, wherein she defends the idea that certain highly visible, high-profile pronouncements from the Executive branch may sufficiently substitute for more formal rule-like enactments, and therefore carry preemptive weight. Kim, *supra* note 6, at 728–31. But, imbuing non-binding pronouncements with preemptive authority makes it too easy for a sufficiently motivated President to invalidate state integrationist policies, and remove checks on hyper-enforcement policies by an administration. *Id.*; see Rubenstein, *supra* note 22, at 993–95, 1004–05; Rubenstein, *supra* note 37, at 283–94.

²²⁴ Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 183–84, 192 (2015).

²²⁵ Both Section 287(g) and Secure Communities are federal agency programs that seek to enlist state and local participation and aid to help increase and facilitate immigration enforcement. Secure Communities automatically feeds local arrests into national immigration databases to check immigration status of arrestees. Section 287(g), named after the statutory section authorizing it, permits DHS to enter into agreements with local authorities for the purpose of training and deputizing them into limited forms of immigration enforcement. Although both programs leverage state-level cooperation, both are structured

and the *Arizona* litigation itself—substantiate their point.²²⁶ But even prior to the Trump Presidency, a few commentators, including Catherine Kim (writing separately) and David Rubenstein and myself (writing together), conjectured about the federalism concerns posed by a hyper enforcement-oriented President under *Arizona*-style preemption.²²⁷ As the Trump Administration made clear, some executives may be willing to cede to states control over the level and manner of enforcement, and promote state interventions without federal management. In its public filings and speeches, Trump Administration officials supported both the specific application of state law in the workplace setting at issue in *Kansas*,²²⁸ and more generally supported—at least in rhetoric—any and all enforcement-enhancing tactics at both the federal and subfederal levels, while opposing enforcement-mitigation programs including DACA.²²⁹

On the one hand, imbuing certain high-profile and official statements of agency officials with preemptive effect alleviates some concerns about process, accountability, and deliberation.²³⁰ The public nature of memoranda and

to ensure that the federal executive maintains ultimate control over the prosecution and punishment of noncitizens apprehended as a result of either one. If federal immigration authorities do not want to proceed in prosecuting the noncitizens apprehended as part of either enforcement program, the noncitizens cannot be punished separately by states. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T., <https://www.ice.gov/secure-communities> [<https://perma.cc/KFM9-3RNX>] (Feb. 9, 2021); *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T. (Oct. 18, 2022), <https://www.ice.gov/identify-and-arrest/287g> [<https://perma.cc/V9L3-W3NN>].

²²⁶ COX & RODRÍGUEZ, *supra* note 7, at 140–42, 150–53.

²²⁷ See Rubenstein & Gulasekaram, *supra* note 25, at 621 (“Moreover, on functional grounds, preemption via nonbinding executive action arguably makes it too easy for a sufficiently motivated Executive to preempt state alternatives Preemption via nonbinding executive policies could permit executive branch officials to preempt state integrationist laws . . . with equal facility.”); see also David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 139–51 (2013). Catherine Kim similarly sounded this alarm in her defense of giving preemptive effect to Executive Branch decisions without formal rulemaking or adjudication process. Kim, *supra* note 6, at 730–31 (“To be sure, the proposed approach . . . would not only privilege executive decisions protective of aliens . . . but also those that might be less favorable to immigrants. . . . [T]he executive branch could accomplish such ends . . . if the President himself announced the decision in a transparent and public manner.”).

²²⁸ Brief for United States as Amicus Curiae Supporting Petitioner at 11–12, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834).

²²⁹ See Exec. Order No. 13,768 § 8, 82 Fed. Reg. 8799 (Jan. 25, 2017); Memorandum from the Sec’y of U.S. Dep’t of Homeland Sec., Enforcement of the Immigration Laws to Serve the National Interest 3–4 (Feb. 20, 2017) (directing expansion of Section 287(g) program), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/GX2Z-ULEE>].

²³⁰ As Catherine Kim argues, the DHS memoranda cited by the *Arizona* court bore the indicia of more formal agency action that the court has used for preemption in other contexts. Kim, *supra* note 6, at 729.

announcements, in turn, may help mitigate concerns with aggrandizement of executive authority. The President or high-ranking executive officials would be associated with the articulated enforcement policy, theoretically allowing the public to check abuses or excesses through the political process. By focusing on presidential preferences or high-ranking official statements, one unitary executive acting transparently would be the main driver of federal policy. By comparison, executive enforcement practices are the product of several factors, and would include the work of a cadre of civil service employees within the federal bureaucracy, working behind closed doors in ways that are not understood easily by the public.

On the other hand, over-reliance on public statements or memoranda from executive officials risks swinging the pendulum too far from statutory text. It would render enforcement federalism doctrine at the mercy of presidential administrations,²³¹ allowing executive officials to manipulate preemption decisions through high-profile statements. These concerns may explain why the *Kansas* majority notes, but also discards, the Trump Administration's support of the state's prosecutions.²³² Had the *Kansas* majority more firmly leaned on the President's blessing as the basis for non-preemption, one would assume that the Biden Administration's (or a subsequent one's) rejection of similar state prosecutions would require a federal court to change course yet again.

On this point, Justice Alito's opinion in *Kansas* is correct: The DOJ's support for Kansas's prosecutions of noncitizens should not dictate preemption results. What follows, however, is the need for *more* sustained inquiry into executive enforcement patterns and practices, not discounting federal enforcement altogether. Once Kansas is allowed to enforce its laws in ways that are at odds with executive enforcement practice, it constrains federal enforcement choices and changes the expected sanction of immigration law. That discretion to choose whether, what mode, and what degree of enforcement (or to increase or decrease it) has effectively diminished whether the Trump or Biden Administrations, or subsequent ones, want to change their support for state intervention. Federal enforcement then, would become beholden to state policies.

The dispositive question is whether Executive Branch memoranda, orders, and statements were accompanied by meaningful shifts in executive agency behavior that increased the expected sanction of immigration law.²³³ Presidents and high-ranking officials would remain the primary drivers of executive enforcement practice, but their desire to allocate resources, change enforcement protocols, and shift the behavior of agency personnel would matter more than the facile and extreme positions they could take in pronouncements alone. In

²³¹ See Rubenstein, *supra* note 22, at 995–97.

²³² *Kansas v. Garcia*, 140 S. Ct. 791, 807 (2020).

²³³ Cf. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1136 (2016) (noting that although presidential directives can change policy, it is much more difficult to change the minds and actions of ground-level enforcement agents).

this way, executive enforcement practice would tend to stabilize preemption decisions across administrations, until and unless any particular administration was willing to invest the financial resources and political capital sufficient to change the expected sanction of immigration enforcement.

What mattered in *Arizona* then, was that the Obama Administration and prior ones chose not to engage in maximal immigration enforcement, or meaningful workplace enforcement against noncitizens, not the specific articulation in DHS memoranda. The decision to publicize their enforcement priorities in guidance memoranda changed the public-facing nature of their activities and brought pressure to bear on lower-level officers and the civil service bureaucracy within DHS.²³⁴ Those memoranda, however, should not be understood as sufficient for preemption. Instead, they operated as convenient shorthand for a broader set of considerations regarding enforcement patterns, resource allocations, policy preferences, and agency protocols.

Undoubtedly, accounting for executive enforcement practice puts a thumb on the scale in favor of preemption. In cases where possibilities for federal criminal or civil prosecution exist, federal immigration authorities are likely to have declined to robustly enforce several potential immigration violations. Such a preemption methodology does not, however, foreclose the possibility of complementary state enforcement efforts. Indeed, in *Arizona* itself, the Supreme Court declined to enjoin SB 1070's section 2(B), despite accounting for executive enforcement discretion.²³⁵ Although the state eventually agreed not to enforce section 2(B), the provision's initial survival is significant. First, it demonstrates that while consideration of executive enforcement practices might favor a preemption finding, the methodology is not inherently fatal to state policies.²³⁶ Second, it shows that a state enforcement provision affecting noncitizens might be lawful for some purposes but can venture into illegality depending on its targeted or discriminatory application.²³⁷

Another illustrative example might be the context of illegal entry and illegal reentry criminal prosecutions by the federal government.²³⁸ The INA criminalizes harboring or smuggling unlawfully present noncitizens, entering

²³⁴ See COX & RODRÍGUEZ, *supra* note 7, at 183–88.

²³⁵ See MOTOMURA, *supra* note 21, at 127 (addressing non-preemption of section 2(B), arguing that just because state and local laws fill gaps in federal law does not mean federal law preempts state law, and noting formal law requiring federal responses to state status inquiries). Adam Cox argues that this non-preemption is consistent with reading *Arizona* as centrally focused on executive control over immigration. The information-sharing provision allowed state officers to gain information about immigration status, but without a separate state penalty, any sanction that followed would have to be the function of federal authorities. See Cox, *supra* note 5, at 53–54.

²³⁶ See *supra* Part II.A.

²³⁷ See *id.*

²³⁸ See 8 U.S.C. §§ 1325, 1326 (criminalizing entry without inspection and entry after being ordered removed).

without inspection, and entering after a prior removal order.²³⁹ Without endorsing such prosecutions,²⁴⁰ it is worth noting that federal executive actions with regards to those immigration crimes evince a closer relationship between statutory text, actual enforcement practices, and public statements of executive officers. As per the DOJ's reporting, in Fiscal Year (FY) 2002, the United States prosecuted relatively few individuals for entry and reentry violations; by FY 2019, the DOJ was prosecuting record numbers of such crimes, representing an over 4,000% rise in entry prosecutions, and over 285% rise in illegal reentry prosecutions.²⁴¹ These prosecutions became, and continue to be, the most-prosecuted federal offenses.²⁴² Those increases were accompanied by a series of high-profile agency actions through the George W. Bush, Obama, and Trump

²³⁹ *Id.* §§ 1324, 1325, 1326.

²⁴⁰ These prosecutions, most often done en masse, raise serious due process concerns, and questions over appropriate uses of judicial and prosecutorial resources. JESSE FRANZBLAU, NAT'L IMMIGR. JUST. CTR., *DECRIMINALIZING MIGRATION: ENDING PROSECUTIONS FOR BORDER CROSSING VIOLATIONS* 2–3 (Aug. 2019), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2019-07/Decriminalizing_migration_policy%20brief_August2019.pdf [<https://perma.cc/EVF6-8VAP>]; JOANNA LYDGATE, U.C. BERKELEY L. SCH., *ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE I* (Jan. 2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf [<https://perma.cc/F7YE-WM5N>]. In addition, as commentators have noted, they criminalize racial and ethnic minorities, and the prohibitions are based in racial prejudice and anti-foreigner sentiment. Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053–54 (2022). *See generally* KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017).

²⁴¹ In FY2002, DOJ prosecuted approximately 2,000 entry violations rising to nearly 81,000 by FY2019, and illegal re-entry prosecutions rose from about 9,000 up to 25,426 in the same time period. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *CRIMINAL PROSECUTIONS FOR ILLEGAL ENTRY UP, RE-ENTRY DOWN: LATEST FIGURES AS OF MAY 2016* (July 2016), <https://trac.syr.edu/immigration/reports/430/> [<https://perma.cc/R2R4-5ZAC>]; Press Release, U.S. Dep't of Just., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2009), <https://www.justice.gov/opa/pr/departement-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year> [<https://perma.cc/YT98-RMHH>]; *see also* Letter from Civil Rights Organizations to President Joseph Biden, End Operation Streamline and De-Prioritize Migration-Related Prosecutions at 1–2, nn.3–7 (Feb. 4, 2021), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2021-02/Letter%20End%20Streamline%20and%20De-prioritize%20immigration%20prosecutions%202.4.21.pdf> [<https://perma.cc/S8S9-LF74>].

²⁴² TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *IMMIGRATION PROSECUTIONS FOR JUNE 2021* (July 2021), <https://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun21/fil/> [<https://perma.cc/R2AG-BTMX>]; TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *FEDERAL CRIMINAL PROSECUTIONS PLUMMET IN WAKE OF COVID-19* tbl.2 (May 2020), <https://trac.syr.edu/tracreports/crim/609/> [<https://perma.cc/8M9R-R3C6>]; AM. IMMIGR. COUNCIL, *PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES* 8 n.12 (Aug. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [<https://perma.cc/3CK6-2L7W>].

Presidencies, culminating in the notorious “zero-tolerance” policies of the Trump DOJ.²⁴³ Although neither prior administrations nor the Trump Administration ever reached actual “zero-tolerance,”²⁴⁴ those administrations dedicated resources to enforcement in ways that altered the on the ground experience of immigration law, turning sparsely used code sections into major portions of the federal judicial docket.²⁴⁵ For enforcement federalism purposes, a court might very well evaluate this federal policy quite differently than federal workplace enforcement generally, or identity fraud on employment verification specifically: Areas in which the potential for federal enforcement has not been buttressed with sustained and significant presidential enforcement attention.

C. Kansas *Revisited*

How would *Kansas* turn out when preemption analysis accounts for presidential enforcement practice? The answer requires more nuanced judicial considerations than provided by the Court.

Kansas’s express preemption holding would remain unchanged. In effect, express preemption (or express saving) analysis represents instances where Congress has “clawed back” immigration authority that has accreted to the Executive. IRCA, for example, would still clearly preempt laws like California’s employer sanctions laws and the copycat labor laws that emerged in several states. For that matter, LAWA’s leveraging of business licenses (upheld in *Whiting*), might survive even under a preemption analysis that accounts for executive practice.²⁴⁶ Executive enforcement practice would not alter an explicit legislative determination that no state laws should exist (or that they may).

²⁴³ AM. IMMIGR. COUNCIL, *supra* note 242, at 2–4 (discussing Operation Streamline and other enforcement programs).

²⁴⁴ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, “ZERO TOLERANCE” AT THE BORDER: RHETORIC VS. REALITY (July 2018), <https://trac.syr.edu/whatsnew/email.180724.html> [<https://perma.cc/R8TT-2DGU>].

²⁴⁵ In 2020, the Transactional Records Clearinghouse reported that federal immigration criminal cases comprised sixty percent of federal court prosecutions. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, PROSECUTIONS FOR 2020 fig.2 (June 2020), <https://tracfed.syr.edu/results/9x705ed667de5d.html> [<https://perma.cc/HNC7-WC96>]; TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 151 (showing that in twelve-month period from 2018–2019, only eleven individuals and no companies were prosecuted “for employing immigrants without proper documentation”; meanwhile 85,727 individuals were prosecuted for illegal entry and 34,617 prosecuted for illegal reentry). *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

²⁴⁶ *See* Hills, Arizona, *supra* note 22, at 198, 213–14 (noting that LAWA targeted businesses and not noncitizens based on immigration status). Of course, in cases like *Whiting*, litigants might still argue over the definitions and scope of legislative text, as happens in express preemption cases. *See* Brief for Respondents at 1, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834); Brief for United States as Amicus Curiae Supporting Petitioner at 11, *Kansas v. Garcia*, 140 S. Ct. 791 (2019) (No. 17-834).

In contrast, accounting for presidential enforcement practice would require three major deviations from the majority's field and obstacle preemption analyses. First, because Kansas's laws do not target noncitizens on their face, a court would determine if Kansas's prosecutions, as applied, had a nexus to immigration enforcement. Here, a relevant consideration would be whether the state prosecution alters the expected sanction for unauthorized work under federal immigration law, and to what extent the noncitizen's conduct was intended to navigate federal immigration rules. Second, a judicial decisionmaker would query whether Congress has provided the potential for federal enforcement: That is, does federal law authorize the federal Executive to choose strategically between criminal or civil liabilities for the conduct? Third, under this Article's approach, a court would consider whether and how the Executive has used that authority and discretion. This inquiry determines the degree and intensity of federal enforcement and the President's use of available sanctions. A court may conclude that the Executive has engaged in deliberate underenforcement, or that the Executive has chosen to rely on removal or other penalties rather than criminal enforcement of federal document fraud laws. I take each of these steps in turn.

In the first step, a court would determine whether the state law, policy, or prosecutorial decision has a nexus to immigration enforcement. In instances like Prop 187 and *Arizona*, this link is obvious in the face of the law. Prop 187 devised state-level immigration statuses, denied state benefits to people without regular status, and conscripted state agencies into enforcing immigration law through recordkeeping and reporting.²⁴⁷ Similarly, SB 1070 directly incorporated federal immigration status as the basis for state crimes or arrest authority.²⁴⁸ In comparison, Kansas's identity theft and fraud laws pre-dated their application to unauthorized noncitizens in the employment process, and serve societal functions well beyond the immigration control context.²⁴⁹ Accordingly, preemption claims would require as-applied challenges that can establish the link between the state charge and immigration-related enforcement.

In the context of an as-applied challenge,²⁵⁰ the nexus between federal immigration law and the Kansas prosecutions is just as manifest as *Plyler*, the Prop 187, or *Arizona* cases. Absent a concern with the noncitizens' immigration status, Kansas law enforcement personnel would have had no reason to have investigated identity information based on a traffic stop, and certainly would have no reason to collaborate with ICE officials. The defendants, of course, would have had no reason to acquire the false identities but for federal

²⁴⁷ Johnson, *supra* note 128, at 1861.

²⁴⁸ ARIZ. REV. STAT. ANN. § 13-1509 (2022).

²⁴⁹ KAN. STAT. ANN. §§ 21-5824, 21-6107 (2022) (both state statutes became effective on July 1, 2011, whereas *Kansas* occurred in 2020).

²⁵⁰ No one seriously contended that Kansas statutes were facially invalid. *See Kansas v. Garcia*, 140 S. Ct. 791, 811 (2020) (Breyer, J., dissenting).

immigration law's documentation requirements for employment. As such, Justice Alito's insistence that state tax forms serve a different purpose than the I-9 forms misses the mark. The forms may serve different purposes, but the identity theft—the conduct creating criminal liability—was intended to overcome the primary, if not sole, motivating concern of IRCA: To prevent those unauthorized noncitizens from gaining employment. The state did not argue that the false identities were procured for other purposes or benefits (such as opening bank accounts, opening lines of credit, or procuring loans).

The individual circumstances of investigation and prosecution confirm the immigration-related purpose of Kansas's prosecutions. For example, one of the noncitizens was discovered only because federal immigration authorities were investigating his relative for immigration violations, and happened upon the defendant in the course of that investigation.²⁵¹ Indeed, the federal government itself chose not to pursue charges against one of the defendants because he was cooperating with federal authorities on a federal investigation into workplace violations by an employer.²⁵² Finally, the state of Kansas initially prosecuted the noncitizens based on the information contained in the I-9.²⁵³ Only when confronted with IRCA's express prohibition on I-9 use²⁵⁴ did the state abandon that tack, and charge the defendants based on information they entered on federal and state tax withholding forms. Beyond these inputs readily apparent in *Kansas*, courts in other cases might also look to the results under state criminal prosecutions. The more noncitizens are disproportionately targeted by zealous prosecutors under state laws,²⁵⁵ the more it looks like the state prosecutions are used as substitutes for federal immigration enforcement.

In the second step, courts would determine whether federal law provides for the potential for federal enforcement of the offending behavior. This step distinguishes *Kansas* from *De Canas* and teaches why *De Canas* does not control. As noted, in *De Canas*, federal law had yet to include any workplace enforcement provisions, and nothing in the background federal statute authorized federal prosecutions for unauthorized employment.²⁵⁶ After IRCA, however, the INA now criminalizes document and identity fraud in the work verification process.²⁵⁷ In other words, relevant to *Kansas*, federal law empowers the federal executive to prosecute the very same behavior the state

²⁵¹ *State v. Ochoa-Lara*, 401 P.3d 159, 160–61 (Kan. 2017) (reciting underlying facts of Guadalupe Ochoa-Lara's conviction), *rev'd*, 140 S. Ct. 791 (2020).

²⁵² Hegeman, *supra* note 182 (noting that the federal government had declined to charge Ramiro Garcia because he had been cooperating with federal authorities in investigating an employer suspected of directing employees to change social security numbers).

²⁵³ *Kansas*, 140 S. Ct. at 800.

²⁵⁴ *See* 8 U.S.C. § 1324a(b)(5).

²⁵⁵ The three noncitizen-defendants in *Kansas*, for example, were prosecuted by the same district attorney. *See supra* note 182 and accompanying text.

²⁵⁶ *See supra* Part II.B and accompanying notes.

²⁵⁷ *See* 18 U.S.C. § 1546.

sought to punish as one option for deterring unauthorized employment. Of course, the mere possibility of federal enforcement should not collapse implied preemption inquiry into a field preemption conclusion.²⁵⁸ But, because federal law provides for federal penalties, it sets the stage for consideration of presidential enforcement of those penalties.

It is at this third step that enforcement practices matter. Courts would have to determine whether and how the Executive has chosen to enforce federal prohibitions. If federal enforcement practice was to turn the other way, and to decline from engaging in workplace enforcement against noncitizens, for example, this discretionary decision must be included in the preemption calculus. Similarly, executive decisions to engage in removal proceedings rather than criminal enforcement, or to forbear from both in service of other enforcement goals, would become centrally relevant.

In *Kansas* then, a court might have accounted for several contextual factors. For at least one of the noncitizen-defendants, the federal government declined to prosecute criminal or immigration charges in return for other cooperation and aid from that defendant in a federal investigation against his former employer for IRCA violations.²⁵⁹ More broadly for all defendants, the federal government, despite possessing the statutory authority, has not pursued prosecutions of document fraud and identity theft in employment verification. This result is in line with general federal practice and non-use of prosecutorial authority under IRCA's document fraud provisions. This holds true even for the Trump Administration, in spite of its get-tough-on-immigration rhetoric. Indeed, the Trump Administration removed significantly fewer noncitizens through interior enforcement than the Obama Administration did at the time *Arizona* was decided.²⁶⁰ Federal workplace enforcement in particular remained scarce throughout the Trump Administration and charges under 8 USC § 1324a were virtually nonexistent.²⁶¹ In other words, given the authority to criminally prosecute, presidents nevertheless chose only removal actions or no penalties beyond those inherent in unlawful status. These considerations may have led a court to view the state's prosecution of its identity theft laws to be in tension with the enforcement choices and practices of the Executive branch.

²⁵⁸ *Cf.* Cox, *supra* note 5, at 54–55.

²⁵⁹ Hegeman, *supra* note 182.

²⁶⁰ John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/> [https://perma.cc/FWL3-U92G].

²⁶¹ TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 151 (showing that in a twelve-month period from 2018–2019, only eleven individuals and no companies were prosecuted; meanwhile 85,727 individuals were prosecuted for illegal entry and 34,617 prosecuted for illegal reentry); Margaret Newkirk, *E-Verify Laws Across Southern Red States Are Barely Enforced*, BLOOMBERG (Aug. 23, 2018), <https://www.bloomberg.com/news/articles/2018-08-23/e-verify-laws-across-southern-red-states-are-barely-enforced#xj4y7vzkg> [https://perma.cc/J9B9-3SLP].

IV. OBJECTIONS TO PRESIDENTIAL ENFORCEMENT PREEMPTION

This Article's keystone, that enforcement federalism in immigration law should not be governed by *Kansas's* focus on formal law to the exclusion of executive enforcement practice, likely inspires several objections. Part IV below addresses five. First, encouraging judges to look beyond statutory text raises administrability and competency concerns for the judiciary. Second, this Article's emphasis on executive enforcement practices might be seen to inordinately aggrandize presidential power, thus distorting separation of powers norms. Third, at least in immigration enforcement, it eliminates or reverses the "presumption against preemption" that scholars and courts have defended for both sovereignty-related and functionalist reasons. Fourth, accounting for federal enforcement arguably threatens to imbalance enforcement federalism, such that only "pro-immigrant" state laws will be upheld while restrictionist or enforcement-minded state laws would be enjoined. Finally, a bespoke preemption approach to enforcement federalism might keep immigration a constitutional "maverick,"²⁶² thereby justifying exceptional approaches to all immigration-related constitutional claims in way that inure to the detriment of noncitizens.

A. Judicial Manageability and Competence

The most immediate objection to including executive enforcement practice as part of preemption analysis is its impracticability and indeterminacy. This critique trades on two related, but distinct concerns. First is the idea that preemption becomes a freewheeling, untethered exercise when judges are licensed to consider preemptive inputs outside of statutory text. Second is the worry that determining the level of enforcement by looking at executive practice involves a set of indeterminate and nebulous factors that judges are not suited to measure. I take these in turn, suggesting here that the latter objection is more problematic than the former.

Undoubtedly, imbuing federal actions other than duly enacted federal legislation with preemptive power is in tension with the text of Article VI which renders "laws of the United States" supreme. But, the day has likely passed for rigid adherence to federal legislative text alone.²⁶³ The Court has already

²⁶² Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

²⁶³ MOTOMURA, *supra* note 21, at 122 ("It is part of the lawmaking process . . . for any government to choose among a variety of modes for doing so."). Motomura mines *Erie Railroad v. Tompkins* for the proposition that "[f]ederal lawmaking power includes the power to choose whether Congress or the Executive branch makes that law." *Id.* at 123. *But see* Rubenstein, *supra* note 22, at 993–94 (critiquing the claim that the federal government may choose lawmaking modes).

imbued non-legislative, executive and agency actions with preemptive power, and for practical and functional reasons is unlikely to revert back to an exclusive focus on formal law.²⁶⁴ The more important question then, is whether the preemptive federal actions—outside of just legislative text—are sufficiently informed by process constraints, transparency, and attentiveness to federalism values, including substantive ideas of state autonomy.²⁶⁵

As a purely descriptive matter, the Court already has looked beyond statutory text in certain types of implied preemption cases that are doctrinal cousins of immigration enforcement.²⁶⁶ Seemingly, justices have done so because the form that federal policy takes might matter for separation of powers debates, but may not for federalism and preemption purposes.²⁶⁷ In other words, although it could be marshalled to the cause, federalism need not be the guardian of separation of powers, especially under circumstances where there is no clear statutory or practical clarity about the level of control between Congress and the President, as is the case in immigration enforcement.

In the administrative law context, several commentators defend the idea that regulations undergoing notice-and-comment rulemaking may have preemptive effect.²⁶⁸ In allowing administrative agency rules—across a variety of regulatory subjects—to preempt state law, federal courts have relied on a theory of delegated authority by Congress to the agency as sufficient to confer preemptive authority.²⁶⁹ The nature of congressional delegation, as Professor Catherine Kim notes, however, is often general and unspecific.²⁷⁰ As a

²⁶⁴ See Young, *Executive Preemption*, *supra* note 20, at 895–96 (conceding that it is likely “too late in the day” to retreat from agency action and executive preemption); *see, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (duly promulgated rules, through notice-and-comment rulemaking, can preempt state law); Gersen, *supra* note 218, at 231–32. Scholarly reception to administrative law preemption is mixed. While some commentators have defended the practice, for example, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 759–66 (2008); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2127–28 (2009), others have critiqued the practice, for example, David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1153–63 (2012).

²⁶⁵ MOTOMURA, *supra* note 21, at 123–24.

²⁶⁶ See generally Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 467 (2013) (analyzing the types of agency actions that carry the “force of law”). *But cf.* *Wyeth v. Levine*, 555 U.S. 555, 575, 580 (2009) (declining to imbue a regulation’s preamble with preemptive effect).

²⁶⁷ See MOTOMURA, *supra* note 21, at 123.

²⁶⁸ Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2007–10 (2008). See generally Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1237–38 (2021).

²⁶⁹ Kim, *supra* note 6, at 698.

²⁷⁰ Of course, as she also notes, in the typical administrative agency preemption case, the agency has produced a policy through procedural formalities like notice-and-comment rulemaking. Kim, *supra* note 6, at 699, 723–25; Rubenstein, *supra* note 22, at 993–95.

functional matter, these broad and vague delegations of authority, even if express, likely do not constrain agency or executive output any more meaningfully than judicial considerations of implicit delegations and resource allocations by Congress.

In the area of foreign affairs,²⁷¹ for example, the Court has sometimes deferred to presidential policy even without express delegation by Congress or the procedural safeguards of agency action.²⁷² There, the only limitations appear to be the judicial conclusion that the matter is truly within the core ambit of “foreign affairs” entrusted to a singular executive, or that the Executive’s action conflicts with congressional policy, as Justice Jackson’s oft-cited concurring opinion in *Youngstown Sheet & Tube v. Sawyer* might advise.²⁷³ Indeed, as it concerns foreign affairs, the Court has been willing to imbue presidential discretion with preemptive effect, even when the President has not affirmatively utilized his delegated authority.²⁷⁴ And, importantly, the Court has credited the President’s choice of a softer or less robust enforcement option than states would prefer.²⁷⁵ The takeaway point is that immigration enforcement shares the

²⁷¹ This conceptual tie between immigration control and foreign affairs has led to one of the enduring framing problems inherent in immigration preemption decisions: Virtually any state regulation of noncitizens can be connected to a foreign policy concern. *See, e.g.*, Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340–41 (2002); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 12 (1990) (“While ‘foreign policy’ has provided a convenient excuse, it hardly seems to capture the deep structure of our thinking about immigration and the Constitution.”). I do not mean to suggest that immigration is solely about foreign affairs or should be understood this way. The line between foreign and domestic is permeable and shifting. Immigration regulation—especially at the state level—has several domestically focused aspects. Moreover, this Article’s call for considering enforcement practice does not require exclusive federal control. Instead, it assumes that many state enforcement efforts that affect noncitizens may very well be lawful even when applied to regulate noncitizens. *See infra* Part IV.D.

²⁷² *See* *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–20, 424 n.14 (2003) (holding that executive authority over the conduct of foreign affairs preempted state law, even when the President was acting without express congressional authority).

²⁷³ *See* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)); *Garamendi*, 539 U.S. at 414 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)).

²⁷⁴ *Crosby*, 530 U.S. at 375–76 (“[T]he statute has placed the President in a position with as much discretion to exercise economic leverage against Burma And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.”).

²⁷⁵ *Garamendi*, 539 U.S. at 427 (“The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.”).

hallmarks of institutional relationships and regulatory areas in which the Court has looked to the actions and practices of federal officials, rather than simply formal laws or rules.

Of course, any time courts reach beyond explicit statements in federal legislation, the judicial task may become messy and harder to predict. And, certainly applying that approach to *Kansas* would mean significant judicial intervention.²⁷⁶ Yet, that is true generally for implied preemption analysis whether it is limited to formal law or not.²⁷⁷ Whenever courts engage in purposivist or holistic evaluations of complex federal codes to determine congressional intent, they wade into a contestable and indeterminate ground.²⁷⁸ That task would appear to be made no murkier—and it is possibly made more coherent—by accounting for executive enforcement. Thus, a general concern with consideration of inputs beyond federal statutory text serves as a critique not just of enforcement practice as a distillation of federal policy, but a more general broadside against purposivism in statutory analysis or perhaps implied preemption as a concept. While such a position may be tenable, it also has significant ramifications beyond the immigration context, and I do not undertake a fulsome defense of implied preemption and purposivism here.

A more difficult judicial manageability objection regards the ability of judges to consistently and reasonably determine the degree of executive

²⁷⁶ Chantae N. Simms, Note, *Kansas v. Garcia: Restoring Historic State Police Powers in Traditional Areas of Criminal Law Enforcement*, 80 MD. L. REV. 463, 484–86 (2021) (suggesting that *Kansas* avoids the problem of excessive and standardless judicial intervention).

²⁷⁷ This Article is grounded in the premise that implied preemption analysis, regardless of regulatory area, requires a degree of purposivist analysis, or at least requires looking beyond text. For those interested in abandoning the doctrine of implied preemption altogether, the preemption approach I defend here will typify the indeterminacy of any non-express preemption case. My intent here is not to provide full-blown defense of implied preemption or purposivism. In brief, my view is that textualism and express preemption are unlikely to eliminate the determinacy concerns. Tools of linguistic analysis are limited and create concerns even in express preemption cases. Outside of express preemption cases, the limitations of those tools make pure textual analysis inapt to resolve conflicts over structural power allocation. While textualism and express language might have carried the day in *Whiting*, in many other situations that form of analysis is unlikely to provide meaningful and useful answers to preemption questions in general, let alone immigration enforcement disputes. See generally Meltzer, *supra* note 20 (analyzing the feasibility of textualism in preemption, and explaining why the method does not govern in preemption cases). But see Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1056–57 (2013) (noting that preemption is the sole doctrinal area in which statutory interpretation relies on purpose, rather than starting with the text, and arguing that preemption too, should rely on textualism).

²⁷⁸ MOTOMURA, *supra* note 21, at 122 (“[T]he very idea of implied preemption assumes that the federal government need not anticipate and foreclose every possible inconsistent state or local government decision, and that it need not enact a federal statute precisely addressing every issue where it may be important to assert federal prerogatives.”).

enforcement practice for preemption purposes. To be sure, my proposal would have to be iterative and developed over time. Still, given that courts have already acknowledged the relevance of the lack of, or minimal, federal immigration enforcement when evaluating the viability of restrictionist state laws,²⁷⁹ it stands to reason that those same judges could devise a framework within which to consider the import of differing levels of federal enforcement.

As a start, this Article has already argued that high-level executive statements might be necessary, but certainly not sufficient or dispositive. Relatedly, guidance that directs immigration authorities to engage in, or forebear from, certain prosecutions might indicate a stronger intent to change enforcement practice and expected sanction. In addition, courts might look to prosecution rates as compared to estimated violators as one indication of the how the Executive Branch has chosen to enforce the broad dictates of the INA. Such a balancing of factors to determine the extent of federal policy is not without precedent. For example, in *Kisor v. Wilkie*, a plurality of the Court indicated that *Auer* deference only inheres in agency's decisions that are "authoritative" or the "official position" of the agency, and not an ad hoc statement by an agency official.²⁸⁰ The plurality further suggested that determining authoritativeness would require recognizing the "reality of bureaucratic life," depending on the nature of the actors and the types of actions used to create the authoritative position.²⁸¹

This multi-factored approach may partially address Professor David Rubenstein's pointed critique that a narrow reading of *Arizona* would allow "macro-level executive policies honored in the breach" to have preemptive effect,²⁸² or Justice Alito's rhetorical query in his *Arizona* dissent.²⁸³ Thicker conceptions of executive enforcement practice—incorporating more than articulated priorities by the President or agency heads—are more difficult to manipulate than macro-level announcements and cannot be effectuated without accompanying, large-scale changes in executive agency behavior.

B. Presidential Aggrandizement

Beyond judicial aggrandizement, executive practice in preemption analysis raises a separation of powers concern between the President and Congress. Here,

²⁷⁹ See *supra* Part II.C.

²⁸⁰ Compare *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416–17 (2019) (expanding upon the conditions necessary for deference to an agency's interpretation of its own policies), with *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

²⁸¹ *Kisor*, 139 S. Ct. 2416.

²⁸² Rubenstein, *supra* note 22, at 996.

²⁸³ *Arizona v. United States*, 567 U.S. 387, 445 (2012) (Alito, J., concurring in part and dissenting in part) ("If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?").

the objection is that the Executive would accrete authority previously reserved only for legislative action. Imbuing executive enforcement practice with preemptive effect could exacerbate what some scholars believe to be a troubling trend towards aggrandized executive power at the expense of congressional authority.²⁸⁴ This Article is not intended to celebrate presidential control over immigration law or to provide a normative defense of presidential authority in that realm. My claim, however, starts from the premise that Congress has effectively already expressly renounced, or practically relinquished, significant control over immigration policy to the Executive.²⁸⁵

If one accepts executive control as descriptively accurate, the appropriate question is how to account for it in preemption analysis, without unduly amplifying it. On this score, this Article argues that including executive enforcement practices in preemption doctrine does little to exacerbate the Executive aggrandizement problem; rather, it operates within the current reality of de jure and de facto authority shared by the legislative and Executive Branches in immigration enforcement. Indeed, this Article's suggestion allows transparency into the source of federal preemptive authority, rather than descent into murky "plenary power preemption."

Certainly, judicial recognition of executive enforcement practice in preemption decisions would provide judicial imprimatur to the Executive control, and further entrench its legitimacy. In that respect, however, it would not significantly differ from the Court's transparent acknowledgement in *Arizona*, and more opaque recognition in cases like *Plyler*. In both cases, the Court identified the importance of executive enforcement and its restraint on state action.²⁸⁶

Indeed, one virtue of considering executive enforcement practice—rather than a narrow focus on executive statements or legal interpretations—is that it would moderate the potential reach of *Arizona*. Instead of a singular memorandum or Rose Garden announcement, several more inputs that determine executive practice—agency regulations, resource allocation, enforcement protocols, and accreted practice over time—would define federal policy for preemption purposes. As a product of multiple inputs, including agency deliberation, the policy preferences of the President and agency heads, yearly budgetary allocations, and the buy-in of agency employees, a broad view of enforcement practice would help ensure that a singular individual would not accrue excessive authority.

Without having to make conclusive determinations regarding the limits of presidential authority, one might query whether the benefits of executive practice preemption are worth the costs. For example, Professor Roderick Hills raises the issue of aggrandized presidential power vis-à-vis Congress in his

²⁸⁴ See generally COX & RODRÍGUEZ, *supra* note 7, at 135–42.

²⁸⁵ See generally *id.* at 191–214.

²⁸⁶ See *supra* Part II.A; MOTOMURA, *supra* note 21, at 123.

critique of the *Arizona*'s methodology.²⁸⁷ Despite his skepticism, however, he nevertheless resurrects a plausible defense of that case's preemption approach by noting that the Court may have factored executive enforcement priorities into its obstacle preemption analysis as a rights-protecting measure.²⁸⁸ Without accounting for Executive Branch enforcement, politically vulnerable and disadvantaged noncitizens would face a barrage of legal disabilities for unauthorized noncitizens created by federal and subfederal laws.²⁸⁹ Against this rights-enhancing benefit, Hills pits the cost that the preemption methodology risks eroding congressional power.²⁹⁰ In immigration, however, Congress either deliberately chose, or silently acquiesced, to the erosion of its own authority. Moreover, even if congressional power was unduly eroded, it remains unclear why preemption doctrine must be recruited to rescue the Legislative Branch.

C. *Rejecting a Presumption Against Preemption*

While it is doubtful that executive enforcement preemption further erodes congressional authority, it would almost certainly dampen possibilities for state enforcement against noncitizens in immigration-related areas. Congress likely has not considered the specific type of state interventions that are the subject of implied preemption suits or has not legislated specifically enough to address them.²⁹¹ As such, increasing preemptive inputs increases the likelihood of uncovering a latent tension between subfederal policy and federal policy. Accordingly, for proponents of state authority, one value of limiting preemption to clear statements in congressional legislation is the higher likelihood that state policies will survive. Outside of immigration enforcement cases, many preemption scholars have argued for a doctrinal presumption against preemption as a way of preserving such state authority.²⁹²

²⁸⁷ Hills, *Arizona*, *supra* note 22, at 212–18.

²⁸⁸ *Id.* at 212–17.

²⁸⁹ *Id.* Hills argues that the most defensible understanding of *Arizona* is that the Court relied on presidential prosecutorial discretion to safeguard the rights of vulnerable minority groups. *See id.* at 216–17. Doing so, however, might impose significant costs to our understanding of preemption and federalism, and to Congress' power. Other commentators have focused more acutely on this rights-preserving/anti-discrimination rationale. *See, e.g.,* MOTOMURA, *supra* note 21, at 135–43; Abrams, *supra* note 55, at 637–39. I highlight Hills only because his earlier work is skeptical of preemption.

²⁹⁰ *See* Hills, *Arizona*, *supra* note 22, at 190 (“Allowing the president to preempt state enforcement efforts not only limits state power but also Congress's power, by depriving Congress of an alternative agent for carrying out federal laws when the president's refusal to execute the laws runs counter to Congress's will.”).

²⁹¹ Meltzer, *supra* note 20, at 18.

²⁹² *See, e.g., id.* at 1; Young, *Ordinary Diet of the Law*, *supra* note 20, at 256; Hills, *Against Preemption*, *supra* note 20; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229–33 (2000).

The conventional arguments in favor of preserving state authority, however, are not persuasive in the immigration enforcement context. For example, focusing on the post-New Deal expansion of federal authority and regulatory reach, Professor Ernest Young argues that a limited preemption doctrine should work as a counterbalance.²⁹³ He defends the application of a presumption against preemption as a compensating mechanism that can help alleviate the concern that federal authority will overtake, displace, or compete with state regulation in areas that used to be the sole or concurrent province of states.²⁹⁴ In essence, Young suggests that such a presumption should operate as a structural check on ever-expanding national powers.²⁹⁵

A compensating presumption against preemption might make sense in regulatory areas where concurrent state authority is the traditional norm, and where state prohibitions operate independently of federal policies. In immigration, however, these principles are ill-fit.²⁹⁶ After the passage of the Thirteenth and Fourteenth Amendments, the ascendancy of national citizenship, and the passage of the first national immigration laws, the federal government assumed primary immigration control.²⁹⁷ This federalization occurred well-prior to the post-New Deal expansion that animates Professor Young's concern.

Related to the development of a federal body of immigration law, most state immigration enforcement laws do not—because they cannot—operate independently of federal law. Federal law defines lawful and unlawful presence

²⁹³ Young, *Ordinary Diet of the Law*, *supra* note 20, at 256; Young, *Executive Preemption*, *supra* note 20, at 872.

²⁹⁴ Young, *Ordinary Diet of the Law*, *supra* note 20, at 324 (“I have defended the presumption against preemption elsewhere as a necessary ‘compensating adjustment’ to preserve the Constitution’s commitment to federalism . . .”).

²⁹⁵ *Id.*

²⁹⁶ MOTOMURA, *supra* note 21, at 137; *Arizona v. United States*, 567 U.S. 387, 417–22 (2012) (Scalia, J., dissenting). It is true that for the first century of the republic state and local laws operated as migration controls. Neuman, *supra* note 93, at 1834. In his *Arizona* dissent, for example, the late-Justice Antonin Scalia conjured this history in arguing that states should retain sovereign authority over noncitizens within their borders, irrespective of federal law or enforcement discretion. This, of course, was in an era with little or no congressional regulation of immigration (other than naturalization laws), when state citizenship carried primary significance, and when federal lawmakers deadlocked over concerns that migration control meant control over slavery. MOTOMURA, *supra* note 21, at 137. Indeed, several scholars have critiqued Scalia’s oddly “anachronistic” reasoning, which ignores post-Civil War historical and doctrinal developments. *See, e.g.*, Cox, *supra* note 22, at 58–59; Hills, *Arizona*, *supra* note 22, at 216–17 (“To cite *Milh* [in Scalia’s *Arizona* dissent] for the proposition that states have a sovereign interest in excluding persons who have no right to enter the state is akin to citing *Plessy v. Ferguson* for the proposition that states have a sovereign interest in regulating public transportation.” (footnote omitted)).

²⁹⁷ *See supra* note 296 and accompanying text; GULASEKARAM & RAMAKRISHNAN, *supra* note 4, at 17–29.

and the requirements for seeking employment.²⁹⁸ State enforcement efforts related to immigration status, or applications of state law to situations where noncitizens are attempting to evade immigration law, are necessarily derivative of and dependent on federal law. In combination, these two background principles suggest that many of the preconditions for a “presumption against preemption” do not apply to the immigration enforcement context.

Professor Roderick Hills offers another functional basis for a default rule in favor of state authority that again fails to capture immigration dynamics. In a seminal article, he argues “against preemption” on the theory that it facilitates the ability of states to put things on the national agenda and force congressional action.²⁹⁹ In his view, courts should choose a default rule that places the burden on regulated industries to lobby for preemptive legislation from Congress, as those industries are likely to have the resources and motivation to lobby national lawmakers for legislative redress when state regulation affects their interests.³⁰⁰ In his formulation, a non-preemption default rule places the burden on special interest groups (SIGs), rather than public interest groups (PIGs) to lobby for preemption.³⁰¹

Whatever merit Hills’s argument might have in other areas, his assumptions fail to hold in immigration enforcement. As Hills acknowledges in later work, state immigration enforcement laws affect vulnerable, politically powerless, and dispersed groups of noncitizens.³⁰² That affected population is unlike the well-resourced firms that seems to underlie Hills’s paradigm case for favoring non-preemption.³⁰³ In contrast, in immigration enforcement, Hills’s assumption regarding PIGs is flipped: unlike in other business or industry regulation, immigrant advocates and public interest groups representing noncitizens generally argue for preemption of state regulation.³⁰⁴ True enough, in *Whiting*, private industry groups were sufficiently motivated to litigate in favor of preemption.³⁰⁵ *Whiting*, however, is not generalizable to state efforts like

²⁹⁸ 8 U.S.C. § 1182(a)(9)(B)(ii); see *Working in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states> [<https://perma.cc/CA34-YSC5>].

²⁹⁹ Hills, *Against Preemption*, *supra* note 20, at 1.

³⁰⁰ *Id.* at 16–17.

³⁰¹ *Id.* at 32.

³⁰² Hills, *Arizona*, *supra* note 22, at 212–18.

³⁰³ Hills, *Against Preemption*, *supra* note 20, at 17 (stating that his proposal in part rests on the hypothesis that “state regulation of business for the sake of health, safety, or environmental quality gives regulated interests an incentive to put broad issues . . . on the congressional agenda” and that those regulated industries have “greater capacity” to elicit congressional response).

³⁰⁴ See *id.* at 32. Of course, it very well might be the case in immigration enforcement that PIGs (broadly conceived) representing restrictionist causes may be on the anti-preemption side, along with the state or local government.

³⁰⁵ Brief of Business Organizations as Amici Curiae in Support of Petitioners at 6, *Chamber of Com. v. Whiting*, 563 U.S. 582 (2011) (No. 09-115); Brief of the Service

Kansas's. Even though both relate to workplace enforcement, state prosecutions like the ones in *Kansas* target undocumented noncitizens and do not directly burden the businesses that employ them. In most enforcement federalism cases, the types of incentives proffered by Hills do not exist.

In addition, there are other practical reasons to question Hills's provocative claim.³⁰⁶ Specifically, in no other regulatory area might federal legislative response to state enactments be more difficult to achieve than in immigration reform. Even outside immigration, implied preemption decisions resulting in the perseverance of state law are divisive and Congress rarely, if ever, legislatively addresses and revises those decisions through subsequent lawmaking.³⁰⁷ That practical concern is magnified in immigration control, where major amendments to federal enforcement provisions are at least twenty-five to thirty years old, the employment provisions creating IRCA are thirty-five years old, and the basic structure of visa allocation is over fifty years old.³⁰⁸ No attempts at immigration reform, either comprehensive or piecemeal, have been successful for the last few decades despite federal administrations who were keen on accomplishing it and broad agreement that the immigration system is "broken."³⁰⁹

Of course, the fact that allowing state enforcement policies may not spur Congressional response does not mean that federal courts must avoid employing presumptions against preemption.³¹⁰ Indeed, many may view this as a feature

Employees International Union as Amicus Curiae in Support of Petitioners at 4, Chamber of Com. v. Whiting, 563 U.S. 582 (2011) (No. 09-115); Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners at 7, Chamber of Com. v. Whiting, 563 U.S. 582 (2011) (No. 09-115).

³⁰⁶ Meltzer, *supra* note 20, at 42 (arguing that both theory and practice undermine Hills' account, and noting the absence of legislative response to decisions not to preempt).

³⁰⁷ *Id.*

³⁰⁸ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

³⁰⁹ See, e.g., Soni Sangha, *U.S. Immigration Policy Is Broken, But No One Can Agree on How to Fix It*, FORTUNE (May 21, 2019), <https://fortune.com/2019/05/21/us-new-immigration-policy-2019/> [<https://perma.cc/2PUV-HJRH>]; Michael D. Shear, Miriam Jordan & Manny Fernandez, *The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html> [<https://perma.cc/QXK8-ZR4Q>]. Emblematic of this problem is the failure of DREAM Act legislation to regularize the status of undocumented youth. Despite wide and growing popularity from the voting public, Congress has never been able to pass such legislation either by itself or as part of a larger suite of reforms. See, e.g., Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize 'Dreamers'*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html> [<https://perma.cc/E49F-CYGE>].

³¹⁰ See, e.g., Meltzer, *supra* note 20, at 53-54 (despite rejecting textualist approaches, and other theories that limit implied preemption, nevertheless defending a "a thumb on the

and not a bug. Still, the paucity and unlikelihood of federal legislative response to state enforcement efforts combined with a compelling argument for national control over at least some aspects of migration, at minimum, cast doubts on Hills's functional case for maintaining the presumption in immigration enforcement cases.

Moreover, state legislation and state enforcement practices can still have influential spurring effects on the federal immigration action even if they end up preempted. In a world in which both the President and Congress contribute to, and fashion, federal immigration policy, state enforcement attempts might be understood as expressing dissatisfaction with executive enforcement decisions and nudging the legislature and the Executive Branch to do more. For example, Peter Spiro argues that the enforcement-heavy provisions of 1996 federal immigration overhaul were responsive to state enactments like Prop 187, despite a court enjoining that state law.³¹¹ As it regards executive action, federal agencies in the past have been sensitive to state preferences with regards to enforcement, even without congressional response.³¹² Given the centrality of immigration to the last six presidential contests and the president's responsibility to a national constituency, Kansas's (and other states') prosecutions in the workplace might serve as a message to the federal executive that more resources should be allocated towards workplace enforcement, even if courts were to preempt such state policies.

D. Asymmetry in Immigration Federalism

Another objection to considering enforcement practice in immigration preemption is that it results in asymmetry between the adjudication of enforcement-minded subfederal policies versus integrationist ones.³¹³ Because the level of federal enforcement will necessarily be a fraction of the statutory

scale" against preemption because there is no clear mandate for national uniformity in most regulatory areas).

³¹¹ Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1632–39 (1997).

³¹² See, e.g., Memorandum from Sec'y of Homeland Sec. Jeh Charles Johnson, Secure Communities 1–2 (Nov. 20, 2014) ("Governors, mayors, and state and local law enforcement officials . . . have increasingly refused to cooperate with the [Secure Communities] program."); see also Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 164–68 (2016).

³¹³ In *Black-Box Immigration Federalism*, David Rubenstein highlighted this concern with *Arizona's* methodology, arguing that including executive enforcement priorities risks creating a judicial "black box" wherein judges reach decisions by picking and choosing from an obscured and ever-changing set of federal inputs for preemption. He notes that scholars then must offer compensating mechanisms, such as incorporating anti-discrimination principles into immigration preemption analysis, in order to curtail the possibility that the "black box" might preempt immigrant-friendly state actions while striking down enforcement-enhancing ones. Rubenstein, *supra* note 22, at 990–1004, 1006–07.

coverage, state enforcement-enhancing schemes are more likely to be preempted, while efforts to mitigate enforcement or integrate noncitizens are more likely to be upheld. Framed in this way, *Kansas* represents a necessary corrective: if states constitutionally may disassociate and decouple from immigration enforcement,³¹⁴ as a matter of neutral structural principles and federalist experimentation, enforcement-minded states should be permitted to enhance immigration enforcement.³¹⁵

This potential asymmetry in immigration federalism resulting from a more capacious preemption approach is more apparent than real. First, as already noted, SB 1070's section 2(B) survived preemption analysis in *Arizona*, despite judicial consideration of executive enforcement priorities.³¹⁶ Further, it might be that state intervention in certain areas, that aid in the enforcement of certain criminal provisions of federal law, would survive executive enforcement preemption, given the federal government's demonstrated commitment to aggressive enforcement. Already, at least one long-standing circuit court decision permits independent state and local arrest authority for criminal immigration violations.³¹⁷ Under that jurisprudence and current practice, if state law authorizes local officer action in those circumstances, local police may arrest noncitizens for criminal violations like unlawful entry or unlawful re-entry after a previous removal order.³¹⁸

Second, at least two enforcement programs—Section 287(g) agreements and Secure Communities—provide channels for state and local immigration enforcement. Section 287(g) agreements allow state and local officers to engage directly in immigration related enforcement, assuming the locality has signed such an agreement and has received the proper training and delegation of authority from DHS.³¹⁹ Secure Communities and its variants inherently include

³¹⁴ See generally *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (rejecting challenges to several provisions of state law regulating detention centers, workplace enforcement, and information sharing with federal immigration authorities), *cert. denied*, 141 S. Ct. 124 (2020); Amy Howe, *Court Dismisses "Sanctuary Cities" Petitions*, SCOTUSBLOG (Mar. 5, 2021), <https://www.scotusblog.com/2021/03/court-dismisses-sanctuary-cities-petitions/> [<https://perma.cc/BU6Y-RJ2Q>] (reporting on DOJ filing that led Court to dismiss cases that rejected Trump Administration's efforts to withhold law enforcement grants to jurisdictions that maintained immigration non-cooperation policies).

³¹⁵ See Rubenstein, *supra* note 22, at 1004–06.

³¹⁶ *Arizona v. United States*, 567 U.S. 387, 411–15 (2012).

³¹⁷ *Gonzales v. City of Peoria*, 722 F.2d 468, 475–76 (9th Cir. 1983), *overruled in part on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

³¹⁸ This principle has been criticized persuasively by Hiroshi Motomura and others on several grounds, primary of which is the problem that the criminal/civil line is highly permeable in immigration law. See generally Motomura, *supra* note 81, at 1838. Nevertheless, under *Gonzales*, the criminal arrest authority remains, pursuant to state law authorization. And, as noted in Part III.C., federal enforcement practice has been especially robust in this area, providing a plausible basis for rejecting a preemption claim.

³¹⁹ 8 U.S.C. § 1357(g).

local officers in immigration enforcement by systemically sending information about noncitizen arrestees to federal immigration authorities.³²⁰ In addition to these specific programs, federal and state authorities can and do routinely work on task forces together in specific instances, in areas like human trafficking and drug interdiction.³²¹ Notably, both Section 287(g) and Secure Communities, as well as the joint task force models, include state and local authorities, but maintain federal control over ultimate enforcement and prosecutorial decisions.³²²

Third, states may continue to exercise jurisdiction over noncitizens in all local criminal processes that lack a nexus to immigration law. Thus, abandoning *Kansas* does not mean surrendering a state's ability to prosecute noncitizens for the overwhelming majority of state and local criminal prohibitions. Indeed, given the current (and likely future) structure of federal immigration law, only isolated criminal sanction would be beyond the discretion of subfederal authorities. In most regulatory areas then, the typical enforcement redundancy between federal and subfederal entities that characterizes drug laws, financial prosecutions, and several other fields would apply even if noncitizens were the targets of state enforcement.³²³

Fourth, although sanctuary or other enforcement-mitigation policies garner significant media and academic attention, most jurisdictions maintain no such policies. The overwhelming majority of jurisdictions are either agnostic on the question of aiding federal enforcement efforts, or engage in immigration enforcement by responding to federal requests voluntarily. In several states, counties and cities are not permitted, under current state laws, to maintain a non-cooperation policy at all. Accordingly, in many jurisdictions, local officers and agencies routinely help identify unlawfully present noncitizens, inform federal authorities, detain those noncitizens in local facilities, and help transfer custody to federal authorities. Prosecutors may also consider charging in ways that create immigration consequences.³²⁴ These state arrests and charging decisions have become, in Hiroshi Motomura's formulation, the "discretion that matters."³²⁵

³²⁰ See *Secure Communities*, *supra* note 225.

³²¹ Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 171–73 (2011); *State and Local Task Forces*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/operations/state-and-local-task-forces> [<https://perma.cc/T5GH-JKPX>].

³²² DAN KESSELBRENNER & LORY D. ROSENBERG, NAT'L LAW. 'S GUILD, IMMIGRATION LAW AND CRIMES § 8:1, at 8-1 to 8-6 (Clark Boardman Co. ed. 1988).

³²³ See *Kansas v. Garcia*, 140 S. Ct. 791, 810–11 (2020) (Breyer, J., dissenting) ("On different facts, there would have been no preemption.").

³²⁴ Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1221–25 (2016) (exploring a "collateral enforcement model" wherein prosecutors structure pleas to "maximize the likelihood deportation").

³²⁵ Motomura, *supra* note 81, at 1822.

E. *Immigration Exceptionalism*

A final concern with this Article's proposal is that it amplifies immigration exceptionalism, entrenching immigration jurisprudence outside the constitutional mainstream.³²⁶ Writing nearly four decades ago, Professor Peter Schuck noted that "probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."³²⁷ Despite some movements towards normalization,³²⁸ Schuck's observation still rings true today. The Court's recent *Thuraissigiam v. Department of Homeland Security* and *Trump v. Hawaii* decisions underscore the point.³²⁹ Accordingly, a trenchant critique of a return to an *Arizona*-style enforcement federalism is that it would reify immigration-specific modes of analysis that would redound to the detriment of noncitizens in other constitutional suits.

In prior work, David Rubenstein and I argued that exceptional jurisprudence in any one doctrinal area (like federalism) tends to produce and reinforce exceptional results in other areas of immigration constitutionalism (like individual rights claims or executive power decisions).³³⁰ Although advocates and scholars have consistently (and justifiably) critiqued exceptionalism in rights-based claims,³³¹ theoretical and litigation approaches to other areas of constitutional adjudication—like federalism and separation of powers—is more mixed. At times, immigrant advocates and scholars have advanced theories that trade on ideas that might be framed as exceptional in comparison to mainstream frameworks used in other regulatory areas.³³² Yet, unlike in the individual rights arena, a unique, immigration-specific approach in other constitutional or

³²⁶ See, e.g., Spiro, *supra* note 89 (describing *Arizona* as falling within a tradition of "immigration law exceptionalism").

³²⁷ Schuck, *supra* note 262, at 1.

³²⁸ See, e.g., Kevin R. Johnson, *Immigration in the Supreme Court 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–64 (2015).

³²⁹ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1967–68, 1983 (2020) (upholding administration's expedited removal process and denial of habeas review for noncitizen seeking asylum after being apprehended in the United States, near the southern border); *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–05, 2423 (2018) (upholding presidential proclamation barring entry of noncitizens from several majority Muslim countries).

³³⁰ Rubenstein & Gulasekaram, *supra* note 25, at 627–32.

³³¹ See generally Jeff King, *Two Ironies About American Exceptionalism Over Social Rights*, 12 INT'L J. CONST. LAW 572 (2014); Margaret E. McGuinness, Sanchez-Llamas, *American Human Right Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007); see also Tom Rosentiel, *The Problem of American Exceptionalism*, PEW RSCH. CTR. (May 9, 2006), <https://www.pewresearch.org/2006/05/09/the-problem-of-american-exceptionalism/> [<https://perma.cc/X7HL-BLCD>].

³³² Rubenstein & Gulasekaram, *supra* note 25, at 630–34.

regulatory fields might help curb enforcement-minded policies and advance the cause of immigrant integration.

We argued that this vacillation—between calling for an end to exceptionalism in some immigration cases but emphasizing the need for exceptionalism in others—generates underappreciated systemic costs. Several examples of that type of connected push and pull exist.³³³ If, as we urged, exceptionalism cannot be cabined and marshalled by advocates only for immigrant-friendly causes, federalism exceptionalism might contribute to the re-invigoration of rights-depriving and executive-authority enhancing exceptionalism in other cases, thus delaying the project of integrating immigration jurisprudence into the constitutional mainstream.

Certainly, federalism theories based on the nature of immigration, and/or constitutional defaults to federal exclusivity create the greatest risk of exceptionalism.³³⁴ If a federal court had preempted SB 1070 because its avowed migration-deterrence purpose in section 1, for example, the doctrine would shade closer to exceptional forms of adjudication. In comparison, this Article does not endorse any form of federal exclusivity built on long-abandoned ideas of “dual federalism.”³³⁵ Nor does it suggest other arguably exceptional approaches, such as accounting for equal protection concerns in preemption analysis,³³⁶ or assuming that subfederal regulation will automatically lead to discriminatory enforcement.

Indeed, my proposal need not be understood as bespoke to immigration qua immigration. Instead, it is based on the evolution of the background federal code, and the peculiar nature of immigration status penalties. This claim is consistent with the several federalism scholars have noted that preemption

³³³ *Id.*

³³⁴ For arguments based in robust federal power over enforcement, leaving little if any room for state enforcement, see generally Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004).

³³⁵ See, e.g., Rubenstein & Gulasekaram, *supra* note 25, at 604. See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

³³⁶ See *Lozano v. City of Hazleton*, 620 F. 3d 170, 176, 199–200 (3d Cir. 2010), *vacated* 131 S. Ct. 2958 (2011) (emphasizing possibility of city anti-immigrant ordinance discriminating on the basis of race and national origin, but enjoining on preemption grounds); see also Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 10–40 (2013); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736–46 (2010) (noting approvingly how equal protection arguments may have influenced preemption analysis). But see Rubenstein, *supra* note 22, at 1006–12 (critiquing the idea of “equal pro-emption”).

doctrine raises context-specific concerns in different regulatory areas.³³⁷ Accordingly, it is at least theoretically possible to defend context specific preemption based on the INA's implicit and explicit delegations, and the current structure of immigration enforcement, without averring to the uniqueness of immigration as a field.

Unlike federal exclusivity and dual federalism-based approaches to immigration federalism, my proposed methodology is contingent. The capaciousness of the immigration codes, its contradictory mandates, and its disconnectedness from on-the-ground reality can be modified and mitigated. For example, Congress could drastically narrow the categories that render noncitizens removable, re-enact a statute of limitations on deportation, expressly legislate priorities for enforcement and removal, or remove the persistent disabilities that attach to immigration status. One could even imagine a more radical future in which states play a central role in setting immigration admissions numbers and categories.³³⁸ If states were to play such a role in admissions, and especially in employment-based immigration, states like Kansas would have a stronger claim to wield independent authority over workplace immigration enforcement.

Accordingly, my argument for enforcement-practice focused preemption in immigration enforcement may require rethinking as the background federal statutory and enforcement structure shifts. If the INA, with its enforcement logic and the nature of its penalties, were to be restructured in ways that more closely tracked other regulatory areas, a *Kansas*-like analysis may become appropriate. Understood in this way, what at first glance appears to be a constitutional anomaly may be less so upon closer examination. Undoubtedly, these fine-grained or more nuanced views may still effectively anchor immigration adjudication towards a more exceptional mode. At the same time, it allows advocates and commentators to eschew a preemption carve out for immigration federalism based solely on the fact that the state is regulating in the immigration arena.

³³⁷ See Abrams, *supra* note 55, at 606 (noting that in theory, all preemption uses the same principles, but in practice, context makes a significant difference); Young, *Ordinary Diet of the Law*, *supra* note 20, at 255 (noting that differences in preemption outcomes reflect that any overarching framework for preemption just be applied to a range of diverse statutory regimes including many in which courts share responsibilities with federal agencies, that Congress's preemptive intent varies by context, and that faithful courts will interpret that intent to produce varying results depending on context).

³³⁸ See, e.g., David J. Bier, *State-Sponsored Visas*, in 12 NEW IMMIGRATION IDEAS FOR THE 21ST CENTURY 20 (Alex J. Nowrasteh & David J. Bier eds., 2020) (Cato Institute White Paper, May 13, 2020); MATTHEW LA CORTE & JEREMY L. NEUFELD, NISKANEN CTR, THE LEGISLATIVE HISTORY OF STATE-BASED GUEST WORKER PROGRAMS (May 2017), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2017/05/TheLegislativeHistoryofState-BasedGuestWorkerPrograms.pdf [<https://perma.cc/8ZCS-K43B>] (noting proposals or enacted laws in Arizona, California, Colorado, Florida, Georgia, Kansas, Massachusetts, Michigan, New Mexico, Oklahoma, Texas, Utah, and Vermont for state-level visa allocation systems for guest workers).

V. CONCLUSION

States and localities have always been a part of the immigration enforcement landscape. They will continue to be. Perhaps more so than any other regulatory area, however, preemption in immigration enforcement presents significant doctrinal challenges. Chief among them is how to understand and define federal policy, given the disconnect between law on the books and the law in practice. My account here suggests that the modern jurisprudence of enforcement federalism has implicitly and explicitly accounted for federal enforcement practices in defining federal law and measuring the obstacles that state policies might present. *Kansas* bucks this trend, and did so by ignoring both the central role of executive action and the diminishing importance of congressional text in federal immigration policy. A return to *Arizona* and presidential enforcement preemption is in order.